Supreme Court, U.S.
FILED

941228 JAN 13 1995

No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

SANDRA SALAZAR,

Petitioner,

v.

WHINK PRODUCTS CO., an Iowa corporation,

Respondent.

Petition For Writ Of Certiorari
To The Colorado Supreme Court

PETITION FOR WRIT OF CERTIORARI

F. JAMES DONNELLY, Esq.
DYER DONNELLY & LILLEY
825 Logan Street
Denver, CO 80203-3114
(303) 861-3003

Attorney of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

78 pp

QUESTIONS PRESENTED FOR REVIEW

Whether the limited preemption provision contained in the Federal Hazardous Substances Act, 15 U.S.C. §1261 *et seq.* bars petitioner's state common law tort claim.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iii

REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS DELIVERED IN THE CASE 1

GROUNDS ON WHICH JURISDICTION IS SOUGHT 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS, ETC. 2

STATEMENT OF THE CASE 2

STAGE AT PROCEEDINGS FEDERAL QUESTIONS WERE RAISED 3

ARGUMENT AMPLIFYING REASONS FOR WRIT .. 4

A. BACKGROUND FACTS 4

B. LAW REGARDING BREADTH OF FEDERAL PREEMPTION 6

C. THE FEDERAL HAZARDOUS SUBSTANCES LABELING ACT 10

D. THE APPLICATION OF THE *CIPOLLONE* CASE TO SALAZAR HEREIN IS PARTICULARLY UNFAIR 18

CONCLUSION 21

APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

Bethlehem Steel Co. v. New York State Labor Relations Board, 330 U.S. 767, 67 S.Ct. 1026, 91 L.Ed. 1234 (1947) 7

Blueflame Gas, Inc. v. Van Hoose, 679 P.2d 579 (Colo. 1984) 18

Burke v. Dow Chemical Co., 797 F.Supp. 1128 (E.D. N.Y. 1992) 15, 16

Chemical Specialties Manufacturers v. Allenby, 958 F.2d 942 (1992) 17

Cipollone v. Liggett, ___ U.S. ___, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992) ..... *passim*

Coutre v. Dow Chemical U.S.A., 804 F.Supp. 1298 (D. Mont. 1992) 15

CSX Transp. Inc. v. Easterwood, ___ U.S. ___, 113 S.Ct. 1732, 123 L.Ed.2d 387 (1993) 10

DeHaun v. Whink Products Company, 1994 WL 24322 (N.D. Ill. No. 91C0014) 20, 21

Duplin v. Whink Products Co., 1994 WL 197612 (Conn. Super. 1994) 21

Fidelity Federal Savings & Loan Assn. v. De la Cuesta, 458 U.S. 141, 102 S.Ct. 3014, 73 L.Ed.2d 664 (1982) 7

Hawkinson v. A.H. Robbins Co. Inc., 595 F.Supp. 1290 (D. Colo. 1984) 18

TABLE OF AUTHORITIES – Continued

Page

Hillsborough County v. Automated Medical Laboratories, 471 U.S. 707, 104 S.Ct. 2371, 85 L.Ed.2d 714 (1985) 7

Jenkins v. James B. Day & Company, 634 N.E.2d 998 (1994) 12

Jones v. Rath Packing Co., 430 U.S. 519, 97 S.Ct. 1305, 51 L.Ed.2d 604 (1977) 6

Larsen v. Pacesetter Systems, Inc., 837 P.2d 1273 (Hawaii 1992) 17

Maryland v. Louisiana, 451 U.S. 725, 101 S.Ct. 2114, 68 L.Ed.2d 576 (1981) 8

M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 4 L.Ed. 579 (1819) 6

Moss v. Parks Corporation, 985 F.2d 736 (4th Cir. 1993) 12, 20, 21

Pacific Gas & Elec. Co. v. Energy Resources Conservation and Development Comm'n, 461 U.S. 190, 103 S.Ct. 1713, 75 L.Ed.2d 752 (1983) 7

Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 104 S.Ct. 615, 78 L.Ed.2d 443 (1984) 7

Tafoya v. Sears Roebuck & Co., 884 F.2d 1330 (10th Cir. 1989) 18

Toy Mfrs. of America, Inc. v. Blumenthal, 806 F.Supp. 336 (D. Conn. 1992) 17

Union Ins. Co. v. RCA, 724 P.2d 89 (Colo.App. 1986) 18

TABLE OF AUTHORITIES – Continued

Page

Uptain v. Huntington Labs, 723 P.2d 1322 (Colo. 1986) 14

Wisconsin Public Intervenors v. Mortier, 501 U.S. 597, 111 S.Ct. 2476, 115 L.Ed.2d 532 (1991) 7

AUTHORITIES

Article VI, Clause 2, United States Constitution ... 2, 6, 22

C.R.S. 13-21-403 18

Federal Cigarette Labeling and Advertising Act (1965) 15 U.S.C. §1340 ..... 8, 9

Federal Hazardous Substances Act, 15 U.S.C. §1261 ..... *passim*

Federal Hazardous Substances Act, 15 U.S.C. §1262 ..... 2, 11, 13, 14, 22

Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) 7 U.S.C. §136 *et seq.* 15

Federal Railroad Safety Act of 1970, 45 U.S.C. §1434 10

House Comm. on Interstate and Foreign Commerce, H.R. Rep. No. 861, 86th Cong. 2d Sess. 2 (1960), reprinted in 1960 U.S. Code Cong. & Admin. News, 2833 10

H.R. Rep. No. 2166, 89th Cong.2d Sess. 6, reprinted in 1966 U.S. Code Cong. & Admin. News, 4095 at 4097 11

Ohio Code, Section R.C. 2307.76(A)(1) 13, 14

TABLE OF AUTHORITIES – Continued

Page

Public Health Cigarette Smoking Act (1969), 15 U.S.C. §1331 9

Restatement (2nd) of Torts §402A 14

Laurence H. Tribe, American Constitutional Law §6-25 at 479 8

REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS DELIVERED IN THE CASE.

1. Trial court's opinion upon defendant's motion for summary judgment (Appendix E)

2. Colorado Court of Appeals decision found at *Salazar v. Whink Products Co.*, 881 P.2d 431 (Colo.App. 1994) (Appendix C)

GROUNDS ON WHICH JURISDICTION IS SOUGHT

Jurisdiction is sought for review by this court in that the Colorado Supreme Court has decided an important question of federal law which has not, but should be, settled by this court.

Judgment was entered by the trial court on September 14, 1992.

The Colorado Court of Appeals decision was issued April 7, 1994.

The Petition for Rehearing was denied by the Colorado Court of Appeals on June 27, 1994.

The Petition for Certiorari was denied by the Colorado Supreme Court on October 17, 1994.

JURISDICTION

Jurisdiction is conferred upon this court to review the judgment by writ of certiorari pursuant to 28 U.S.C. §2104 and Rule 10(c) of the Supreme Court Rules.

CONSTITUTIONAL PROVISIONS, ETC.

See Appendix for following pertinent texts.

1. U.S. Constitution, Article VI, Clause 2 (Appendix F)

2. 15 U.S.C. §1261 (Appendix G)

3. 15 U.S.C. §1262 (Appendix H)

4. 15 U.S.C. §1261 (Historical Note) (Appendix I)

STATEMENT OF THE CASE

This case involves a personal injury action brought by Sandra Salazar for injuries which occurred while Ms. Salazar was using a household cleaning product manufactured by defendant, Whink Rust Stain Remover.

Ms. Salazar purchased the product from a grocery store in order to wash her windows. She took the product home and diluted it in water. She then wrapped a towel around her finger, dipped that finger in the Whink/water mixture, and began washing her windows.

Whink contains a substance termed hydrofluoric acid which does incipient damage to the human body. By the time Ms. Salazar felt pain, it was too late. After a series of operations, all uninsured, Ms. Salazar's right index finger had to be amputated. She continues to suffer reflex sympathetic dystrophy as a result of the loss of the finger.

The trial court erroneously entered summary judgment against plaintiff entirely upon state law grounds. On appeal, the Court of Appeals upheld the trial court's ruling. The Colorado Court of Appeals, however, did not reach the issues relied upon by the trial court. Instead, relying upon the recently decided case of *Cipollone v. Liggett*, ___ U.S. ___, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992), the Colorado Court of Appeals held that plaintiff's claims were preempted by the Federal Hazardous Substances Act, 15 U.S.C. §1261 *et seq.* It is with this holding, and its unfair application, that appellant takes issue. Certiorari was denied by the Colorado Supreme Court on October 17, 1994.

STAGE AT PROCEEDINGS FEDERAL QUESTIONS WERE RAISED

The issue of preemption was first raised by defendant Whink in its motion for summary judgment filed January 7, 1992. In essence, Whink claimed that petitioner's claim was preempted by 15 U.S.C. §1261 *et seq.* The trial court never reached the preemption issue.

The issue of preemption was next raised on appeal by defendant Whink in their Reply Brief before the Court of Appeals. The issue was briefed fully by both sides before the Court of Appeals.

The Court of Appeals ruled in Whink's favor on the Federal preemption issue. (Appendix C) The entire opinion concerned the preemption issue.

The Colorado Supreme Court denied petitioner's writ of Certiorari on the issue of Federal preemption. (Appendix A)

ARGUMENT AMPLIFYING REASONS FOR WRIT

A. BACKGROUND FACTS

Plaintiff is a woman born in 1962, who resides in Monte Vista, Colorado (R. p. 461, ll. 6-7). She has two children who at the time of the accident were 14 and 7 (R. p. 465, ll. 7-14).

At the time of the incident in question, plaintiff was employed as an assistant manager at a Yellow Front store (R. p. 472, ll. 10-19). In addition, she performed part-time work as a cleaning lady (R. p. 463, ll. 6-11). Plaintiff did not complete high school, and at the time of the incident she was working to complete her GED (R. p. 462, l. 25 to p. 463, l. 1).

On July 17, 1989 (R. p. 472, ll. 20-24) plaintiff was in the process of doing some general house cleaning work around her home (R. p. 474, ll. 8-10). Towards that purpose, plaintiff visited Monte Vista Super Foods in order to pick up some window cleaner (R. p. 474, ll. 11-21). Ms. Salazar asked the store attendant if he knew of any product that would clean water stains (R. p. 478, ll. 9-17). The employee was unable to help her, but as Ms. Salazar was leaving, another store employee recommended "Whink Rust Stain Remover" (R. p. 479, l. 25 to p. 480, l. 1). On that employee's recommendation, Ms. Salazar purchased a bottle of Whink (R. p. 480, ll. 2-9). The product was purchased for the sum of $2.49 (R. p. 481, l. 1). It

appeared in the cleaning section of the store with other household cleaners (R. p. 480, ll. 3-10).

A full copy of the bottle purchased by plaintiff is found in the record on pages 289 and 290, page 289 being the front and 290 the back. Plaintiff admits she read the front of the bottle, but denies that she read the back (R. p. 481, ll. 18-22). The front of the bottle states:

> **DANGER – MAY BE FATAL OR CAUSE PERMANENT DAMAGE CAUSES SEVERE BURNS WHICH MAY NOT BE IMMEDIATELY PAINFUL OR VISIBLE VAPOR HARMFUL CONTAINS HYDROFLUORIC ACID KEEP OUT OF REACH OF CHILDREN**
>
> **Use only with heavy duty household rubber gloves. Read back panel for additional precautions and directions.**

When she returned home, plaintiff proceeded upon the task of washing her windows. She first washed her windows with a wet sponge without Whink (R. p. 485, ll. 16-21). She then diluted the Whink she had purchased in the water, wrapped a towel around her hand, and proceeded to rub the windows with the towel which had been doused in the Whink-water mixture (R. p. 485, l. 22 to p. 486, l. 4). This seemingly innocent action cost plaintiff the use of her index finger on her dominant hand (R. p. 488, ll. 19-22, and p. 486, ll. 5-7). All totaled, plaintiff spent about three hours cleaning her windows (R. p. 486, ll. 8-10).

Plaintiff at first noticed nothing unusual concerning her hand. Towards the later afternoon, however, she felt a tightness in her hand (R. p. 488, ll. 15-18). Soon thereafter, she experienced a burning sensation (R. p. 490, ll. 1-4). In

order to alleviate the pain, plaintiff flushed her hands with soap and water (R. p. 491, ll. 9-16). Unable to stop the pain, plaintiff was then rushed to a local physician, Dr. Robert Splettstoesser (R. p. 492, ll. 10-20).

The court's ruling concerning summary judgment upon liability made the remainder of the case moot. Plaintiff, in her Disclosure Certificate (R. p. 47-56) and its five supplements (R. pp. 208-210, 223-224, 228-229, 389-394, and 395-396), designated numerous medical experts who were prepared to establish that as a result of this single use of Whink, plaintiff suffered infection of her right index finger, esteomyelitis of the right index finger, amputation of the right index finger (R. p. 49), reflex sympathetic dystrophy (R. pp. 208-209), and over $100,000 in medical bills which were largely uninsured (R. p. 554, ll. 9-23). In addition, plaintiff designated one Mark Litvin, Ph.D., a rehabilitation counselor, who was prepared to testify that plaintiff is virtually unemployable (R. p. 208).

B. LAW REGARDING BREADTH OF FEDERAL PREEMPTION

Article VI, Cl. 2 of the United States Constitution states that the Constitution and laws of the United States "shall be the supreme law of the land." Any state law which conflicts with federal law is thus "without effect." *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 427, 4 L.Ed. 579 (1819).

In general, Congress may preempt state law explicitly by so stating; *Jones v. Rath Packing Co.*, 430 U.S. 519, 97 S.Ct. 1305, 1309, 51 L.Ed.2d 604 (1977); by passing a law

which directly conflicts with state law, *Pacific Gas & Elec. Co. v. Energy Resources Conservation and Development Comm'n*, 461 U.S. 190, 204, 103 S.Ct. 1713, 1722, 75 L.Ed.2d 752 (1983); or may do so by thoroughly occupying a field so that there is no room left for the states to supplement it. *Fidelity Federal Savings & Loan Assn. v. De la Cuesta*, 458 U.S. 141, 153, 102 S.Ct. 3014, 3022, 73 L.Ed.2d 664 (1982). Where Congress has not spoken, there is a presumption against preemption in that Congress is free to speak with drastic clarity whenever it chooses to assure full federal authority. *Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U.S. 767, 67 S.Ct. 1026, 91 L.Ed. 1234 (1947). In addition, there is a strong presumption against preemption if preemption means superseding a state's historical police power; *Wisconsin Public Intervenors v. Mortier*, 501 U.S. 597, 111 S.Ct. 2476, 115 L.Ed.2d 532 (1991); particularly when the regulation in question relates to health and safety. *Hillsborough County v. Automated Medical Laboratories*, 471 U.S. 707, 105 S.Ct. 2371, 85 L.Ed.2d 714 (1985). In *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 104 S.Ct. 615, 78 L.Ed. 443 (1984), for example, this court upheld an award of punitive damages to the estate of a deceased lab analyst injured by a plutonium release, despite federal regulatory control of nuclear facilities by the Nuclear Regulations Commission.

The defendant in *Silkwood, supra*, argued that since the Federal Government had regulated the entire field of nuclear safety, an award of punitive damages sanctioned by state law but not federal law, was in violation of Federal Preemption. This court, however, distinguished between Federal Preemption of state Safety Regulations and preemption of state common law tort claims. Since

Congress was silent concerning state tort law, the court stated that Congress did not intend to preclude the use of state law remedies.

Recent decisions of this court have demonstrated a restrictive view of the preemption doctrine in deference to state's rights. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §6-25 at 479. The court has stated this reluctance as a presumption that Congress did not intend to preempt state law. *Maryland v. Louisiana*, 451 U.S. 725, 101 S.Ct. 2114, 68 L.Ed.2d 576 (1981).

In 1992, this court decided *Cipollone v. Liggett*, ___ U.S. ___, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992). *Cipollone* involved a claim by the estate of a person who had died from smoking cigarettes. The cigarette companies claimed immunity from suit based upon two federal statutes; the Federal Cigarette Labeling and Advertising Act enacted in 1965, and the Cigarette Smoking Act of 1969. Both Acts had preemption provisions. Section 5 of the 1965 Act was captioned "Preemption," and stated:

> (a) No statement relating to smoking and health, other than the statement required by §4 of this Act, shall be required on any cigarette package.
>
> (b) No statement relating to smoking and health shall be required in the advertising of any cigarettes, the packages of which are labeled in conformity with the provisions of this Act.

The 1969 Act, however, modified the preemption provision stating:

> No requirement or prohibition based on smoking and health shall be imposed under

> state law with respect to the advertising or promotion of any cigarettes, the packages of which are labeled in conformity with the provisions of this Act.

The court's analysis began by rejecting defendant's argument that either the 1965 or 1969 Act impliedly preempted state law. When Congress considers preemption through a specific preemption clause, it can be inferred that that clause solely governs preemption or Congress would have stated otherwise (*Cipollone, supra,* 112 S.Ct. at 2618). The court next turned its attention to the narrow wording of the preemption clause in the 1965 Act. The court found the clause: "No statement . . . shall be required in the advertising of [properly labeled] cigarettes," merely prohibited state and federal rule-making bodies from mandating particular cautionary statements on cigarette labels or cigarette advertisements, and did not prohibit state common law failure to warn claims.

In contrast, the 1965 Act utilized much broader language that prohibited states from imposing "requirement[s] or prohibition[s] based on smoking and health with respect to the advertising or promotion of any cigarettes." This emphasis on "requirements and prohibitions" swept broadly and suggested no distinction between positive enactments and common law. Thus, the common law claims for failure to warn after the 1969 Act were barred. The court did not, however, bar any common law claims which were not related to inadequate warnings.

Thus, in the wake of *Cipollone,* whenever Congress addresses the issue of preemption, the question becomes

largely a question of statutory construction, with a presumption mandated against preemption.

In a critical opinion by Justice Blackmun, concurring in part and dissenting in part, Justice Blackmun predicted a "hodge-podge" of lower court decisions. This prediction has, at least in part, come true. Since *Cipollone* was decided in June of 1992, it has been cited over 120 times and the decisions are far from uniform. This court most recently distinguished *Cipollone* in *CSX Transp. Inc. v. Easterwood*, ___ U.S. ___, 113 S.Ct. 1732, 123 L.Ed.2d 387 (1993), holding that state common law claims for negligence were not preempted by regulations passed pursuant to the Federal Railroad Safety Act of 1970.

C. THE FEDERAL HAZARDOUS SUBSTANCES LABELING ACT

In 1960, Congress enacted the Federal Hazardous Substances Labeling Act, 15 U.S.C. §1261 *et seq.* The purpose of the law was to "provide nationally uniform requirements for adequate cautionary labeling of packages of hazardous substances which are sold at interstate commerce and intended or suitable for household use" and to "provide a pattern which states may follow in enacting similar legislation." House Comm. on Interstate and Foreign Commerce, H.R. Rep. No. 861, 86th Cong.2d Sess. 2 (1960), reprinted in 1960 U.S. Code Cong. & Admin. News, 2833, at 2833.

In 1966, the Federal Hazardous Substances Act was amended as the Child Protection Act of 1966. As stated in the bill's legislative history:

> It is impractical, unnecessary and undesirable for each such product to be labeled specially for those states and cities which have developed their own standards for years during which there was no federal law. The committee now recommends a *limited preemption amendment which would encourage and permit states to adopt requirements identical with the Federal requirements for substances subject to the Federal Act, and to enforce them to complement Federal enforcement,* but at the same time would free marketers of products sold interstate from varying or added labeling requirements. H.R. Rep. No. 2166, 89th Cong. 2d Sess. 6, reprinted in 1966 U.S. Code Cong. & Admin. News, 4095, at 4097. (emphasis added)

The above statement on preemption would indicate Congress's sole concern of direct state regulation of labels. The "limited preemption amendment" Congress resultantly drafted is as follows:

> (b)(1)(A) Except as provided in paragraphs (2) and (3), if a hazardous substance or its packaging is subject to a cautionary labeling requirement under §2(p) or 3(b) [15 U.S.C. §1261(p) or §1262(p)] designed to prevent against a risk of illness or injury associated with the substance, *no State or political subdivision of a State may establish or continue in effect a cautionary labeling requirement applicable to said substance or packaging and designed to protect against the same risk of illness or injury unless such cautionary labeling requirement is identical to the labeling requirement under 2(p) or 3(b).*
>
> (B) Except as provided in paragraphs (2), (3), and (4), if under regulations of the Commission

> promulgated under or for the enforcement of section 2(g) [subsec. (g) of this section] a requirement is established to protect against a risk of illness or injury associated with a hazardous substance, *no State or political subdivision or a state may establish or continue in effect a requirement applicable to such substance and designed to protect against the same risk of illness or injury unless such requirement is identical to the requirement established under such regulations.*
>
> 15 U.S.C. §1261, Historical Note – Effect upon Federal and State Law – Pub.L. 86-613, §18, formerly 17, July 12, 1960, 74 Stat. 380, as amended Pub.L. 89-756, §4(a), Nov. 3, 1966, 80 Stat. 1305; renumbered and amended Pub.L. 91-113, §4(a), (b)(1), Nov. 6, 1969, 83 Stat. 189, 190; Pub.L. 94-284, §17(a), May 11, 1976, 90 Stat. 510. (emphasis added)

Whether the above provision in fact preempts state common law tort claims is a question that has not been decided by this court. As stated previously, there is a split of authority in jurisdictions throughout the country. In *Moss v. Parks Corporation*, 985 F.2d 736 (4th Cir. 1993), for example, the Fourth Circuit applied the preemption doctrine to all of the plaintiffs' failure to warn claims. However, even in that extreme case, Plaintiff was allowed to bring claims which argued that the defendants violated FHSA. Other jurisdictions have adopted different approaches.

Jenkins v. James B. Day & Company, 634 N.E.2d 998 (1994), an Ohio Supreme Court case, involved a wrongful death action from a death caused by inhalation of methylene chloride, a substance contained in a certain type of paint stripper called "Marine Strip." The decedent used the Marine Strip while in her attic stripping paint from

furniture. The manufacturer defended the claim on the grounds of Federal preemption through compliance with FHSA. The trial court dismissed the case upon a summary judgment motion.

On appeal, the Ohio Supreme Court first stated that FHSA's preemption clause preempted labeling requirements:

> Unless such cautionary labeling requirement is identical to the labeling requirement under Section 2(p) or 3(b) of Section 18(b)(1)(A) of the FHSA, as amended by Pub. L. 94-284, Section 17(a), 90 Stat. 510, reprinted in 15 U.S.C. §1261 (quoted at page 1002 of the Opinion).

The court then next examined the language of FHSA which required that the product affirmatively state the principal hazard, the appropriate precautionary measure, the appropriate first aid treatment, and the word "poison" (15 U.S.C. §1261(p) and §1262, as cited by the court at 1002). Next, the court turned its attention to the Ohio Code, Section R.C. 2307.76(A)(1). That section provides that a product is defective if, when it leaves control of the manufacturer:

> (a) The manufacturer knew or, in the exercise of reasonable care, should have known about a risk that is associated with the product and that allegedly caused harm for which the claimant seeks to recover compensatory damages;
>
> (b) The manufacturer failed to provide the warning or instruction that a manufacturer exercising reasonable care would have provided concerning that risk, in light of the likelihood that the product would cause harm of the type

> for which the claimant seeks to recover compensatory damages and in light of the likely seriousness of that harm. §RC 2307.76(A)(1) Ohio Code.

Comparing plaintiff's state law tort claims to the requirements of FHSA, the court concluded that the tort claims were, in essence, no different from the FHSA requirements. Thus, the state did not mandate labeling requirements which were not identical to FHSA's requirements, and by the plain reading of the statute, preemption was inapplicable.

The court stated that the fact that the Consumer Product Safety Division had not restrained dissemination of the product, was not controlling. FHSA does not specify all the language required on a product's warning label. The manufacturer formulates his own warning language, but the language is not reviewed for adequacy by any federal agency. 15 U.S.C. §1262(b) grants the Consumer Product Safety Commission authority to promulgate label requirements and §1262(c) allows it to exempt substances from compliance. No section, however, calls for final label approval of a product.

Just as Ohio state law did not pose requirements upon the defendant outside of what was required by FHSA, Sandra Salazar does not seek to impose additional requirements herein. Colorado Products Liability law follows the *Restatement (2nd) of Torts* §402A. *Uptain v. Huntington Labs*, 723 P.2d 1322 (Colo. 1986). Under Colorado law, Salazar must prove that the Whink substance was "unreasonably dangerous," a requirement which adds nothing to the dictates of 15 U.S.C. §§1261 and 1262.

In a Montana Federal District Court case, *Coutre v. Dow Chemical U.S.A.*, 804 F.Supp. 1298 (D. Mont. 1992), the court took a slightly different approach. *Coutre* involved a claim by a rancher who had contracted cancer through the use of a herbicide. The substance in question was governed by the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA") 7 U.S.C. §136 *et seq.*, which had a preemption clause similar to FHSA, which stated as follows:

> Such states shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter. 7 U.S.C. §136V(a)(b)

The defendant moved for summary judgment upon grounds of compliance with FIFRA. Relying upon the narrow construction mandate of *Cipollone*, however, the court denied the motion stating:

> The language of Section 136V(b) can hardly be interpreted as providing "unambiguous evidence of a clear and manifest purpose of Congress to displace state sovereignty . . . "
>
> This court remains circumspect in applying a broad preemption analysis which would displace state law and would extinguish an individual's rights under state law to pursue a common law damages action. (*Id.* at 1302)

Burke v. Dow Chemical Co., 797 F.Supp. 1128 (E.D. N.Y. 1992) also involves a claim brought under FIFRA. In *Burke*, two unborn children contacted brain cancer due to their mother's exposure to a household insecticide manufactured by Dow Chemical Company. The court first

reviewed toxic liability from a historical prospective. Traditionally, the states have performed that function through statutory and common-law tort rules. In contrast, the federal government only entered the field recently, with an emphasis more in terms of protecting the flow of commerce than in protecting the public. No federal agency, stated the court, tests products for the dangers of pregnant women. Individuals are still largely protected through state tort law (*Id.* at 1132).

The court then turned its attention to FIFRA regulations. While administered by the Environmental Protection Agency, most of the information concerning a product is derived from the manufacturer. The EPA does not conduct independent testing. Much of the information which is placed before the EPA is withheld from the public (*Id.* at 1134). On the basis of information provided by the registrant, the EPA must register the product if it determines that (a) its composition is such to warrant the product claims of success; (b) its labeling complies with FIFRA; (c) it will perform as intended; and (d) when used in accordance with widespread and commonly recognized practices, it will not generally cause unreasonable adverse effects on the environment. While there is room for public input in the process, there is no watchdog over the EPA, and the Ralph Naders of the world are limited (*Id.* at 1135).

With this backdrop, the court reviewed the FIFRA preemption clause (similar to the FHSA), and found it read somewhere between the 1965 and 1969 cigarette laws discussed in *Cipollone*. The court thus ruled that if the EPA approved labels were affixed to the containers, plaintiffs could not claim the defendant's products were

mislabeled. However, if plaintiffs claimed that defendant should have taken other steps to protect the public, such as a limitation upon sales only to professionals, or more general warnings to users other than on the label, such an argument survives the preemption clause. The motion for summary judgment was then denied in total. *See also, Toy Mfrs. of America, Inc. v. Blumenthal,* 806 F.Supp. 336 (D. Conn. 1992); *Larsen v. Pacesetter Systems, Inc.,* 837 P.2d 1273 (Hawaii 1992); and *Chemical Specialties Manufacturers v. Allenby,* 958 F.2d 942 (1992).

Salazar submits that there are valid reasons why this court should hold that FHSA does not preempt her claim. First of all, FHSA's preemption clause, as stated in the legislative history, is a "limited" preemption clause. The word "limited" can only mean that legislators anticipated that some state claims could be brought along with FHSA claims. As applied by the Colorado Court of Appeals, it is difficult to understand what that limitation would be. Secondly, the preemption provision of FHSA specifically mandates that the states are only "encouraged to adopt requirements identical to the federal requirements" and to "compliment" federal enforcement. This language reflects a clear intent not to preempt state law claims. Thirdly, the wording of FHSA's preemption provision is more akin to the 1965 Cigarette Act than the 1969 Act, which speaks of "requirements and prohibitions," rather than simply "requirements." Fourthly, despite the mandate of *Cipollone,* the Colorado Court of Appeals applied preemption too broadly. The plaintiff was left without a case after the Court of Appeals' ruling. The ruling ignored plaintiff's repeated pleadings that Whink was

negligent in the design of the product and that the product should not have been sold, regardless of the adequacy of the warnings (R. Vol. I, pp. 13-14, Vol. II, pp. 338-339, Vol. V, p. 21, l. 17 to p. 23, l. 4). Finally, as stated by the Ohio Supreme Court, the relief requested by Salazar saddles Whink with no requirements additional to those mandated by FHSA.

D. THE APPLICATION OF THE *CIPOLLONE* CASE TO SALAZAR HEREIN IS PARTICULARLY UNFAIR.

This matter was filed on July 19, 1990, well prior to the Supreme Court's decision in *Cipollone*. At the time the case was filed, Colorado law was clear that compliance with federal law merely created a presumption that the product was not defective, which could be overcome by competent evidence. As stated in C.R.S. 13-21-403:

> In any product liability action, it shall be rebuttably presumed that the product which caused an injury, death, or property damage, was not defective and that the manufacturer or seller thereof was not negligent if the product:
>
> (b) Complied with, at the time of the sale by the manufacturer, any applicable code, standard, or regulation adopted or promulgated by the United States or by this state, or by any agency of the United States or of this state.

See also Blueflame Gas, Inc. v. Van Hoose, 679 P.2d 579 (Colo. 1984); *Hawkinson v. A.H. Robbins Co. Inc.*, 595 F.Supp. 1290 (D. Colo. 1984); *Union Ins. Co. v. RCA*, 724 P.2d 80 (Colo.App. 1986); *Tafoya v. Sears Roebuck & Co.*, 884 F.2d 1330 (10th Cir. 1989).

Plaintiff has never in this action admitted that Whink's product complied with FHSA. To the contrary, plaintiff simply planned to allow Whink to present its evidence and then argue to the jury that, at best, any compliance found by the jury only created a rebuttable presumption.

On January 7, 1992, Whink moved for summary judgment based both upon the preemption grounds and plaintiff's failure to heed warnings on the bottle. While Whink's motion was pending, in late June 1992, the court decided *Cipollone*. On August 4, 1992, before *Cipollone* even made the reporters, the court entered an order setting Whink's motion for summary judgment for hearing (R. p. 435). In that order, the court specifically limited its inquiry to the "misuse" defense, and not the issue of preemption. On September 14, 1992, Judge Hoffman, in an order which was in error according to Colorado law, dismissed all of plaintiff's claims (R. pp. 235-243). Judge Hoffman specifically did not reach the preemption issue.

On January 13, 1993, plaintiff filed her appeal. After reviewing briefs and oral arguments, the Colorado Court of Appeals did not reach the issue decided by Judge Hoffman. Instead, the court held that plaintiff's action was barred by the *Cipollone* case.

The point of the above chronology is that plaintiff never conducted adequate discovery concerning Whink's compliance with FHSA. This was because when plaintiff prepared her case, the law was that compliance with a federal regulation concerning a warning was only one item of evidence which a jury may consider. Shortly after the law changed, however, Judge Hoffman dismissed the

case on other grounds, and plaintiff was unable to obtain discovery concerning compliance with federal statutes and regulations.

The case of *DeHaun v. Whink Products Company*, 1994 WL 24322 (N.D. Ill. No. 91C0014), decided in the Northern District of Illinois on January 26, 1994, is applicable to the situation at hand. In *DeHaun*, the plaintiff used the same product as used by plaintiff herein. In order to "derust" the family clothing, she sat cross-legged on the floor, wearing rubber gloves, and followed her usual derusting procedure as follows:

1. She held the article of clothing in her left hand;
2. She sprayed the rust stain on the clothing with water from the spray bottle;
3. She applied the product to the stain;
4. She placed the open bottle of product on the floor; and
5. She rolled the article of clothing so that the treated stain was surrounded by the rest of the garment.

While applying the product on the day in question, Mrs. DeHaun spilled some of the product on her leg. As a result, she suffered a very severe burn to her leg, which required a lengthy hospital stay.

Upon a motion for summary judgment by Whink, the court applied *Cipollone* to dismiss the failure to warn claims. The court then, however, relying upon *Moss v. Parks Corporation*, 985 F.2d 736 (4th Cir. 1993), allowed plaintiff to amend her complaint alleging violations of

FHSA. As the *DeHaun* court pointed out, the *Moss v. Parks Corporation* decision, *supra*, sanctioned a private right of action for violations of FHSA. The plaintiff was allowed to amend her complaint, and proceed under that amendment. Plaintiff in *DeHaun* was subsequently able to present evidence which lead to the conclusion that the same substance which is in issue in this matter violated FHSA. *See also Duplin v. Whink Products Co.*, 1994 WL 197612 (Conn. Super. 1994).

At a minimum, should this court disagree with plaintiff's other contentions, the manifest injustice caused by the timing of the *Cipollone* decision in this matter should warrant a remand so that plaintiff can be allowed to argue Whink's failure to comply with FHSA.

CONCLUSION

For each of the reasons stated above, plaintiff Sandra Salazar hereby petitions this Court for a writ of certiorari reviewing the decisions of the Colorado Court of Appeals and the denial of certiorari by the Colorado Supreme Court.

Respectfully submitted this 13th day of January, 1995.

DYER DONNELLY & LILLEY

F. JAMES DONNELLY #12243
825 Logan Street
Denver, CO 80203-3114
(303) 861-3003

APPENDIX

A. Colorado Supreme Court denial of certiorari ..... App. 1

B. Colorado Court of Appeals denial of Petition for Rehearing ..... App. 3

C. Colorado Court of Appeals Opinion ..... App. 4

D. Colorado trial court's denial of Motion for New Trial ..... App. 11

E. Colorado trial court's Opinion ..... App. 12

F. U.S. Constitution, Article VI, Clause 2 ... App. 25

G. 15 U.S.C. §1261 ..... App. 26

H. 15 U.S.C. §1262 ..... App. 36

I. 15 U.S.C. §1261 (Historical Note) ..... App. 49

APPENDIX A

SUPREME COURT, STATE OF COLORADO
CASE NO. 94SC381
CERTIORARI TO THE COLORADO COURT OF APPEALS, 93CA0055
DISTRICT COURT, CITY AND COUNTY OF DENVER, 90CV7830

ORDER OF COURT

SANDRA SALAZAR,

Petitioner,

v.

WHINK PRODUCTS CO., an Iowa corporation,

Respondent.

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals, and after review of the record, the briefs, and the judgment of said Court of Appeals,

IT IS THIS DAY ORDERED that said Petition for Writ of Certiorari shall be, and same hereby is, DENIED.

BY THE COURT, EN BANC, OCTOBER 17, 1994.

cc: F. James Donnelly
DYER DONNELLY & LILLEY
825 Logan Street
Denver, CO 80203-3114

J. Ronald Voss
Amelia L. Klemme
RETHERFORD, MULLEN, JOHNSON & BRUCE

P.O. Box 1580
Colorado Springs, CO 80901-1580

Honorable Morris B. Hoffman
Denver District Court
City and County Building
1437 Bannock Street
Denver, CO 80202
Clerk of the District Court Denver District Court
City and County Building
1437 Bannock Street
Denver, CO 80202

Patrick H. Stanford, Clerk
Colorado Court of Appeals

[SEAL]

Supreme Court
State of Colorado
Certified to be a full, true and correct copy

OCT. 18, 1994

MAC V. DANFORD
Clerk of the Supreme Court
By /s/ Illegible
Deputy Clerk

APPENDIX B

THE COURT OF APPEALS
OF THE STATE OF COLORADO

Case Number 93CA0055

ORDER

SANDRA SALAZAR V WHINK PRODUCTS COMPANY

Upon consideration of the Petition for Rehearing filed by the Appellant herein, the Petition is hereby DENIED. It is ordered that issuance of the Mandate is stayed to and including June 27, 1994 provided that if a Petition for Writ of Certiorari is timely filed with the Supreme Court of the State of Colorado, the stay shall remain in effect until disposition of the cause by the Supreme Court.

BY THE COURT:

Sternberg, C.J.

Briggs, J.

Tursi, J.

DATED: May 26, 1994

[SEAL]

APPENDIX C

COLORADO COURT OF APPEALS April 7, 1994
No. 93CA0055

Sandra Salazar,

Plaintiff-Appellant,

v.

Whink Products Company, an Iowa corporation,

Defendant-Appellee.

Appeal from the District Court of the City and County of Denver

Honorable Morris B. Hoffman, Judge
No. 90CV7830

Division I JUDGMENT AFFIRMED
Opinion by CHIEF JUDGE STERNBERG
Briggs and Tursi*, JJ., concur

Dyer Donnelly & Lilley, F. James Donnelly, Denver, Colorado, for Plaintiff-Appellant

Retherford, Mullen, Johnson & Bruce, J. Ronald Voss, Amelia L. Klemme, Colorado Springs, Colorado, for Defendant-Appellee

*Sitting by assignment of the Chief Justice under provisions of the Colo. Const. art. VI, Sec. 5(3), and § 24-51-1105, C.R.S. (1988 Repl. Vol. 10B).

In this products liability action, plaintiff, Sandra Salazar, appeals the summary judgment entered in favor of defendant, Whink Products Co., which determined that Whink was not liable for plaintiff's injuries resulting from her use of its product, Whink Rust Stain Remover. We affirm.

Plaintiff asserts that genuine issues of material fact remain as to the adequacy of the warnings on the product and the foreseeability of her failure to heed those warnings. Whink contends that the trial court properly dismissed plaintiff's claims on the basis of her unforeseeable misuse of the product, but also argues that her claims are preempted by the Federal Hazardous Substances Act (FHSA), 15 U.S.C. §§ 1261-1277 (1988). It is undisputed that the label on the product at issue complies with the FHSA, and we conclude that the FHSA preempts plaintiff's duty to warn claims. Thus, we affirm the summary judgment, but on grounds different from those relied upon by the trial court.

Under the Supremacy Clause, U.S. Const., art. VI, cl. 2, state laws which "interfere with or are contrary to the laws of Congress, made in pursuance of the constitution," are invalid. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 6 L.Ed. 23 (1824). Whether a federal statute preempts a state law or claim turns on Congressional intent, and that intent may be explicit in the statute itself. *Cipollone v. Liggett Group, Inc.*,___ U.S. ___, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992).

In its most recent pronouncement on federal preemption, the United States Supreme Court held that a broad statement in a federal law prohibiting state regulation

also bars common law tort claims. *Cipollone v. Liggett Group, Inc., supra.*

The federal laws at issue in *Cipollone* were the Federal Cigarette Labeling and Advertising Act (1965 Cigarette Act) and the Public Health Cigarette Smoking Act of 1969 (1969 Cigarette Act), 15 U.S.C. §§ 1331-1340 (1988). The preemption provision in the 1965 Cigarette Act was narrow and stated: "No *statement* relating to smoking and health shall be required *in the advertising* of [properly labeled] cigarettes." *Cipollone, supra,* ___ U.S. at ___, 112 S.Ct. at 2618, 120 L.Ed.2d at 421 (emphasis in original). Congress' emphasis on the words "statement" and "advertising" led the Court to conclude that the 1965 Cigarette Act preempted only state and federal regulations requiring additional warnings, but did not affect state law damages actions.

The 1969 Cigarette Act, however, used much broader language; it barred not merely "statements," but any "requirement[s] or prohibition[s] . . . imposed under state law." *Cipollone, supra,* ___ U.S. at ___, 112 S.Ct. at 2619, 120 L.Ed.2d at 422. This language, the Court held, indicated legislative intent to ban state common law labeling and duty to warn claims along with direct state regulation of labels.

The court noted that: "[T]he phrase '[n]o requirement or prohibition' sweeps broadly and suggests no distinction between positive enactments and common law; to the contrary, those words easily encompass obligations that take the form of common law rules." *Cipollone, supra,* ___ U.S. at ___, 112 S.Ct. at 2620, 120 L.Ed.2d at 426.

In order to succeed in the wake of *Cipollone*, then, the plaintiff would have to show that FHSA's preemption language is less sweeping than the language of the 1969 Cigarette Act; however, we can discern no significant difference between the two.

The FHSA was enacted in 1960 to mandate labeling of certain "hazardous" consumer products intended for use in the household or by children. *Chemical Specialties Manufacturers Ass'n v. Allenby*, 958 F.2d 941 (9th Cir. 1992). The purpose of the Act was to "provide nationally uniform requirements for adequate cautionary labeling." House Committee On Interstate and Foreign Commerce, Federal Hazardous Substances Labeling Act, H.R. Rep. No. 1861, 86th Cong., 2d Sess. 2 (1960), *reprinted in* 1960 U.S.Code Cong. & Admin. News 2833. The scope of the Act's coverage as to these products is extremely broad. *Toy Manufacturers of America, Inc. v. Blumenthal*, 986 F.2d 615 (2d Cir. 1992). Thus, the central requirement of the Act is that manufacturers of hazardous products provide cautionary labels clearly indicating the hazards and providing consumers with directions for use. The parties do not dispute that the label on Whink Rust Stain Remover comports with the FHSA's labeling requirements.

As enacted, the FHSA did not contain a preemption section. However, when the Act was amended in 1966, the legislative history discussed the impracticality of having the states produce potentially fifty different labels for a particular hazardous substance. House Committee On Interstate and Foreign Commerce, Child Protection Act of 1966, H.R.Rep. No. 2166, 89th Cong., 2d Sess. 3 (1966), *reprinted in* 1966 U.S. Code Cong. & Admin. News 4095,

4097. The 1966 amendments added a limited preemption provision which provides as follows:

> It is hereby expressly declared that it is the intent of the Congress to supersede any and all laws of the States and political subdivisions thereof insofar as they may now or hereafter provide for the precautionary labeling of any substance or article intended or suitable for household use (except for those substances defined in sections 2(f) (2) and (3) of this Act) which differs from the requirements or exemptions of this Act or the regulations or interpretations promulgated pursuant thereto. Any law, regulation, or ordinance purporting to establish such a labeling *requirement* shall be null and void.

Child Protection Act of 1966, Pub. L. No. 89-756, 80 Stat. 1303 (1966) (current version at 15 U.S.C. § 1261 (1988)); *see also* § 13-21-403 (1)(b) C.R.S. (1987 Repl. Vol. 6A) (emphasis added).

In our view, the language prohibiting a state from imposing "a requirement" for labeling that is not identical to the labeling requirements under the Act is as inclusive as the language of the 1969 Cigarette Act stating that "no requirement or prohibition" shall be imposed under state law. The prohibition of "a requirement" is the functional equivalent of "no requirement." *See Arkansas-Platte & Gulf v. Van Waters & Rogers,* 981 F.2d 1177 (10th Cir. 1993).

We find persuasive the reasoning of the court in *Moss v. Parks Corp.*, 985 F.2d 736 (4th Cir. 1993), which held that the FHSA preempted common law failure to warn claims when the plaintiff seeks additional or more clearly stated

warnings than those required by the FHSA. In determining that the FHSA applied to common law tort actions as well as state labeling regulations, the court stated that: "[I]f federal law mandates a specific label and permits nothing additional or different, it can hardly be urged that a state tort duty based on a warning requirement that is more elaborate and different does not conflict. The manufacturer in that case cannot comply with both." *Moss v. Parks Corp., supra,* at 739-740.

Moreover, the purposes underlying both legislative regulation of labeling and a state common law duty to warn are the same. Indeed, a state common law duty to warn is nothing more than a duty to label a product to provide information. In that sense, the common law duty is no less "a requirement" in the preemption scheme than a state statute imposing the same burden. The objective of the common law duty and a regulatory statute are the same. Both address a manufacturer's duty to convey information about a product through the medium of a label.

That a common law action can result in an award of damages to an injured party does not detract from the ultimate purpose of imposing a duty to warn the users of a product about its potential dangers or other properties. Therefore, we find it only logical to hold that the common law duty to warn is subjected to the same federal preemptive constraints as a state statute.

Accordingly, to the extent that plaintiff seeks additional, different, or more clearly stated warnings, her claim is expressly preempted by the FHSA.

Because of our disposition of this issue, it is unnecessary to address the remaining issues.

Judgment affirmed.

JUDGE BRIGGS and JUDGE TURSI concur.

APPENDIX D

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO
Case No 90CV7830 Courtroom 21

ORDER

SANDRA SALAZAR,

Plaintiff,

vs.

WHINK PRODUCTS, CO., et al,

Defendants.

Plaintiff's "Motion For New Trial with Accompanying Brief (Rule 59 C.R.C.P.)," filed October 14, 1992, as amended by Plaintiff's "Amendment To Motion For New Trial," filed October 15, 1992, is DENIED.

DATED this 30th day of November, 1992.

BY THE COURT

/s/ Morris B. Hoffman
Morris B. Hoffman
District Judge

cc: F. James Donnelly
Arthur B. Walsh
J. Ronald Voss
12/1/92

APPENDIX E

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO

Case No. 90-CV-7830 Courtroom 21

ORDER

SANDRA SALAZAR,

Plaintiff,

v.

WHINK PRODUCTS CO., an Iowa corporation and MONTE VISTA ARAPAHOE, INC., dba MONTE VISTA SUPER FOODS, a Colorado Corporation, ROBERT W. SPLETTSTOESSER, M.D., and MONTE VISTA PROFESSIONAL ASSOCIATES,

Defendants.

THIS MATTER is before me on a Motion for Summary Judgment filed by Defendant Whink Products Company ("Whink") on January 8, 1992, joined by Defendants Monte Vista Arapahoe, Inc. ("Super Foods"), Robert W. Splettstoesser ("Splettstoesser") and Monte Vista Professional Associates ("Monte Vista"). Based on my review of the Motion and briefs, the affidavits, and the case file, and the hearing held on the Motion on September 10, 1992, I rule as follows.

I. INTRODUCTION

Motions for summary judgment are disfavored, and the allegations of the non-movant must be taken as true

unless they are clearly disproved by unrebutted affidavits or products of discovery. *Continental Air Lines. Inc. v. Keenan,* 731 P.2d 708 (Colo. 1987). With this standard in mind, the material facts of this case are as follows.

The case arises out of Plaintiff's allegations that she was injured while using Whink Rust Stain Remover, and that she was thereafter negligently treated for her injuries. At the time of her injuries, Plaintiff had been in the professional cleaning business for 11 years. She cleaned offices as well as private residences. In July 1989, Plaintiff visited Defendant Super Foods for the purpose of purchasing a window cleaner, apparently to use on some water stained windows in Plaintiff's own home. In reliance on a specific recommendation of the owner of the Super Foods store, Plaintiff purchased a bottle of Whink Rust Stain Remover. Whink Rust Stain Remover is a cleaning fluid designed to remove rust stains from fabrics and well as sinks and toilet bowls. It is 8% hydrofluoric acid.

The bottle which Plaintiff purchased contained the following warnings on the front of the bottle (emphasis in original):

> Not a general purpose rust remover.
>
> Read precautions and directions before using.
>
> DANGER: MAY BE FATAL OR CAUSE PERMANENT DAMAGE. CAUSES SEVERE BURNS WHICH MAY NOT BE IMMEDIATELY PAINFUL OR VISIBLE. VAPORS HARMFUL. CONTAINS HYDROFLUORIC ACID. KEEP OUT OF REACH OF CHILDREN. Use Only With Heavy Duty Household Rubber Gloves. Read back panel for additional pre-cautions and directions.

The back of the bottle was marked at the top with skulls and crossbones and the following warning (emphasis in original):

> DANGER-POISON
> AVOID CONTACT WITH SKIN OR EYES.
> DO NOT TASTE, SWALLOW OR BREATHE.

The back also contained certain general instructions on use, as well as medical instructions should the product be swallowed or come in contact with the skin or eyes.

Plaintiff read the warnings on the front of the bottle, including the directions to wear rubber gloves, but did not read the warnings on the back until after she sustained her injuries.

Plaintiff spent three hours washing her windows with a Whink-soaked towel wrapped around her unprotected right hand. Later that afternoon, Plaintiff's hand began to burn, she was unable to stop the pain with water, and she was rushed to Dr. Splettstoesser's clinic. Plaintiff claims Splettstoesser negligently misdiagnosed her chemical burns as an allergic reaction, resulting in significant delays in appropriate treatment.

Plaintiff suffered second and third degree burns on her right thumb and forefinger, and underwent two amputative surgeries to her right index finger. Plaintiff has a permanent disability rating, and also suffers from reflex sympathetic dystrophy.

II. CLAIMS AND DEFENSES

Plaintiff asserts the following claims against the following Defendants:

CLAIM	TYPE	DEFENDANT
First	Negligence	Whink
Second	Products liability	Whink
Third	Negligence	Super Foods
Fourth	Breach of implied warranty	Super Foods
Fifth	Exemplary damages	All
Sixth	Medical malpractice	Splettstoesser Monte Vista

At oral argument, Plaintiff's counsel announced that Plaintiff has settled the case with all Defendants except Whink, and that documents reflecting that settlement have been prepared and are in the process of being executed.

Plaintiff seeks in excess of $70,000.00 in medical expenses, damages for past and future lost wages, pain and suffering, and exemplary damages.

Defendants raise two arguments in their Motion: (1) Plaintiff's claims are preempted by the Federal Hazardous Substances Act, 15 U.S.C. §§ 1261 *et seq.*, and (2) Plaintiff's claims are barred by Plaintiff's misuse. Because I agree that Plaintiff's claims are barred as a matter of law by her own misuse, I do not reach Defendants' preemption argument.

III. THE UNCONTRADICTED FACTS REQUIRE DISMISSAL OF THE FAILURE TO WARN ASPECTS OF PLAINTIFF'S CLAIMS

The strict liability concepts set out in § 402A of the Restatement (2d) of Torts, as adopted in Colorado in *Hiigel v. General Motors Corp.*, 190 Colo. 57, 544 P.2d 983 (1975), recognize two general categories of product liability actions – one where the product is claimed to be organically defective, or, in the language of the Restatement, "unreasonably dangerous," and another where the claimed defect is a failure to warn. *See Jackson v. Harsco Corp.*, 673 P.2d 363 (Colo. 1983).

Here, Plaintiff's Amended Complaint confuses these two basic concepts with each other, and also confuses strict liability with negligence, and unreasonable dangerousness with ultrahazardousness.[1] Despite these shortcomings, it is clear that the focus of Plaintiff's strict liability and negligence claims is an alleged failure to warn. *See* Amended Complaint ¶¶ 12(b) and 15. At oral argument, Plaintiff's counsel indicated that the gravamen of Plaintiff's failure to warn case is that Whink failed to give the latent nature of the danger – the fact that the product doesn't burn until long after coming in contact with the skin – adequate prominence, and that Plaintiff's expert would so testify. There are several problems with this argument.

First, Plaintiff has not supported this argument with her expert's report or with transcripts from the expert's

---

[1] See Part IV below.

deposition. Counsel's mere representations at this stage are insufficient to create a triable issue of fact, in the face of the undisputed presence of just such a warning in what appears to me to be a fairly prominent place on the front of the Whink bottle. *See Sullivan v. Davis*, 172 Colo. 490, 474 P.2d 218 (1970).

More importantly, Plaintiff has admitted not only that she read the warnings contained on the front of the bottle, but that she understood them. *See* excerpts of Plaintiff's Deposition set forth in Part V.B below. Thus, the warnings, however inadequate, managed to find their way into Plaintiff's consciousness. Any inadequacy could therefore not, as a matter of law, have caused any of Plaintiff's injuries. *See Schultz v. Linden-Alimak, Inc.*, 734 P.2d 146 (Colo. App. 1986).

This is really just a different way of describing the conclusion reached in Part V.B below; namely, that Plaintiff misused the product by failing to heed the warnings which she admittedly read and appreciated.

IV. WHINK STAIN REMOVER IS NOT "ULTRAHAZARDOUS"

At oral argument, Plaintiff's counsel indicated that his use of the term "ultrahazardous" in his First and Second Claims for Relief was not inartful, but rather that Plaintiff is taking the position that Whink Rust Stain Remover is indeed ultrahazardous in the sense that it triggers absolute liable [sic]. Plaintiff's argument in this regard is wholly unsupportable.

Our appellate courts have recognized only two specific activities as being so "ultrahazardous" as to render the performers of these activities absolutely liable for all damages arising therefrom. Those specific activities are dynamite blasting (*Garden of the Gods Village v. Hellman*, 133 Colo. 286, 294 P.2d 597 (1956)) and the impoundment of water (*Garnet Ditch & Reservoir Co. v. Sampson*, 48 Colo. 285, 110 P. 79 (1910)). Indeed, on every occasion since 1956 in which our appellate courts have been asked to expand this doctrine into other areas, they have expressly refused to do so. *Liber v. Flor*, 160 Colo. 7, 415 P.2d 332 (1960) (*storage* of dynamite is not ultrahazardous); *Forrest v. Imperial Distr. Serv. Inc.*, 712 P.2d 488 (Colo. App. 1987), *rev'd on other grds.*, 741 P.2d 1251 (Colo. 1987) (storage and handling of caustic chemicals is not ultrahazardous); and *Hartford Fire Ins. Co. v. Public Serv. Co.*, 676 P.2d 25 (Colo. App. 1983) (transmission of natural gas not ultrahazardous). *Cf. City of Northglenn v. Chevron U.S.A. Inc.*, 519 F. Supp. 515 (D. Colo. 1981), in which Judge Carrigan indicated his belief that the Colorado courts would extend the doctrine of ultrahazardousness to the storage of underground gasoline tanks. I note, however, that when Judge Carrigan decided *Northglenn*, he did not have the benefit of either of the Court of Appeals, or the Supreme Court's opinions in *Forrest*. *See generally* Restatement (2d) of Torts §§ 519 and 520 (recognizing the concept of ultrahazardousness but calling it "abnormally dangerous activities").

Plaintiff's argument that Whink Rust Stain Remover is ultrahazardous, and therefore that Whink is an absolute insurer of any and all damage caused by its sale of its

product, would, if adopted, represent an entirely unwarranted and unprecedented expansion of the doctrine of ultrahazardousness.

V. THE UNCONTRADICTED FACTS ESTABLISH MISUSE AS A MATTER OF LAW

A. General

The defense of misuse in a products case was first expressly articulated by our Supreme Court in *Jackson v. Harsco Corp., supra.* The *Jackson* Court described the defense this way:

> Misuse by an injured party which cannot reasonably be anticipated by the manufacturer can be utilized as a defense in a products liability case by showing that the conduct of the user, and not the alleged defect in the product, actually caused the accident.

673 P.2d at 367. *See also Bradford v. Bendix-Westinghouse Automotive Air Brake Co.*, 33 Colo. App. 99, 517 P.2d 406 (1973). There are thus two elements which must be proved to establish the misuse defense: (1) the misuse must be unforeseeable from the manufacturer's point of view, and (2) the misuse must have caused the injuries.

One kind of misuse arises when an injured party uses a product for a purpose for which the product was not intended. But our appellate courts have come to recognize that it may also be misuse to use a product to accomplish its intended purpose, but to do so in an unforeseeably improper *manner. See, e.g., Uptain v. Huttington Lab, Inc.*, 723 P.2d 1322 (Colo. 1986) *Patterson v. Magna American Corp.*, 754 P.2d 1385 (Colo. App. 1988).

When the user is notified of the proper manner of use, "the seller may reasonably assume that [such notice] will be read and heeded." *Uptain*, 723 P.2d at 1327, *citing* Comment J to the Restatement (2d) of Torts § 402A.

B. It Is Uncontroverted That Plaintiff Read And Understood The Warnings, And Unforeseeably Misused The Product By Failing To Heed The Warnings.

It is certainly true that the foreseeability of any misuse is a question of fact, generally inappropriate for resolution by summary judgment. *Uptain, supra.*

On the other hand, where, as here, a plaintiff admits to reading a warning, and to consciously choosing to disregard the warning, and when heeding that warning would have avoided all of a plaintiff's injuries, then I do not believe there is anything left for a jury to decide.

Plaintiff testified as follows regarding her reading and appreciation of the front label warnings:

Q: Did you read the bottle before you opened it?

A: I read the front part of it. Plaintiff's Deposition, p. 25, lines 18-20.

Q: Why didn't you go get some gloves?

A: Because I didn't have any gloves. *Id.* at 28, lines 23-24.

Q: Before you used the product, did you read the words "causes severe burns," before you used the product?

A. I read the front of that bottle.

Q. All of it?

A. Yes.

Q. Before you used the bottle?

A. Yes.

Id. p. at 45, lines 2-9.

Q. You didn't have any questions about what [the label] meant?

A. No.

Id. p. at 47, lines 11-13.

Q. All right. We get down to the sentence that reads: "Use only with heavy duty household rubber gloves." If I understand what you told Mr. Cooper, the reason that you didn't use household rubber gloves was because you didn't have any there?

A: Right.

Q: Any [sic] you didn't want to spend the time to go back to the store to get some?

A: Right. And by using the rag, I felt it was the same way of not getting contact to my skin. I felt it was thick enough, that there was no way it could reach my skin.

Id. at 152, lines 21-25; 153, lines 1-5.

Q: Did you think about going back to the store to get rubber gloves?

A: I thought in my head: What harm could it do, I'm not using it straight on my hand.

Q: When you read that sentence, did you understand that it was important to protect yourself from this product contacting your skin?

A: Yes, I did.

Q: Did you think about going back to the grocery store to get rubber gloves so that that wouldn't happen?

A: No. *Id.* at 153, lines 14-25.

Q: Even though you started out thinking that the heavy rag would be sufficient to keep the product away from your skin, at some point during the cleaning process, you realized that it wasn't because you felt wetness on your skin, is that right?

A: Yes.

Q: At that time did you consider going back to the grocery store to get some rubber gloves so you wouldn't have any additional contact on your skin from the product?

A: No, because I didn't feel nothing that would indicate that something was wrong.

Q: You did read the sentence that says: "Causes severe burns which may not be immediately painful or visible"?

A: When I was reading it as a paragraph, yes. *Id.* at 154, lines 8-25.

It is clear to me from this deposition transcript not only that Plaintiff read and appreciated the warnings placed on the front of the bottle, but also that there was nothing on earth that Whink could have done to make these warnings sink in.[2] This is one of those extreme misuse cases, like *Schultz v. Linden-Alimak, Inc.*, 734 P.2d 146 (Colo. 1986), in which a manufacturer places warnings on a product, the warnings are sufficient to be understood and appreciated by the plaintiff, but the plaintiff simply and plainly chooses to ignore the warnings.

Uptain, which also involved injuries to a plaintiff who used a cleaning product without rubber gloves, is quite instructive. In affirming the trial court's conclusion that misuse was a question of fact for the jury, the Supreme Court made much of the fact that the warnings in that case did *not* contain explicit directions to wear rubber gloves. Moreover, it was the plaintiff in *Uptain* arguing that her misuse was foreseeable as a matter of law, rather than the defendant arguing it was unforeseeable. Finally, the plaintiff in *Uptain* used a swab to apply the product; she came in contact with the product directly only when periodically wringing the swab out during rinses.

Here, the evidence is also undisputed, as it was in *Schultz*, that had Plaintiff not ignored the warnings – that is, had Plaintiff worn rubber gloves as directed – she

---

[2] I have reviewed not only the portion of Plaintiff's transcript which Defendants submitted with their briefs, but the entire transcript, which I directed Defendants to submit prior to the September 10, 1992 hearing.

would have avoided her injuries entirely. Report of Dr. Daniel A. Goldstein, dated May 28, 1991, attached as Exhibit F to Whink's Motion for Summary Judgment. Thus, it was Plaintiff's own volitional act of using the product contrary to the warnings which caused her injuries, not any product defect or failure to warn.

VI. CONCLUSION

For all of the reasons discussed above, Defendants' Motion for Summary Judgment is GRANTED as to all of Plaintiff's claims against Whink, and all of those claims are hereby DISMISSED WITH PREJUDICE. This dismissal will become a final judgment when Plaintiff's claims against the non-Whink Defendants are dismissed pursuant to the settlement.

Plaintiff and the non-Whink Defendants are directed to file a stipulated motion for dismissal and draft order reflecting their settlement within 30 days of the date of this Order.

Dated this 14th day of September, 1992.

BY THE COURT:

/s/ Morris B. Hoffman
Morris B. Hoffman
District Court Judge

cc: A. Walsh
F. James Donnelly
J. Ronald Voss
L. Heintz
D. Smith

APPENDIX F

CONSTITUTION OF THE UNITED STATES

ARTICLE VI

Paragraph 2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

APPENDIX G

15 USC § 1261,

s 1261. Definitions

For the purposes of this chapter –

(a) The term "territory" means any territory or possession of the United States, including the District of Columbia and the Commonwealth of Puerto Rico but excluding the Canal Zone.

(b) The term "interstate commerce" means (1) commerce between any State or territory and any place outside thereof, and (2) commerce within the District of Columbia or within any territory not organized with a legislative body.

(c) Omitted.

(d) The term "Commission" means the Consumer Product Safety Commission.

(e) The term "person" includes an individual, partnership, corporation, and association.

(f) The term "hazardous substance" means:

(1) (A) Any substance or mixture of substances which (i) is toxic, (ii) is corrosive, (iii) is an irritant, (iv) is a strong sensitizer, (v) is flammable or combustible, or (vi) generates pressure through decomposition, heat, or other means, if such substance or mixture of substances may cause substantial personal injury or substantial illness during or as a proximate result of any customary or reasonably foreseeable handling or use, including reasonably foreseeable ingestion by children.

(B) Any substances which the Commission by regulation finds, pursuant to the provisions of section 1262(a) of this title, meet the requirements of subparagraph (l)(A) of this paragraph.

(C) Any radioactive substance, if, with respect to such substance as used in a particular class of article or as packaged, the Commission determines by regulation that the substance is sufficiently hazardous to require labeling in accordance with this chapter in order to protect the public health.

(D) Any toy or other article intended for use by children which the Commission by regulation determines, in accordance with section 1262(e) of this title, presents an electrical, mechanical, or thermal hazard.

(E) Any solder which has a lead content in excess of 0.2 percent.

(2) The term "hazardous substance" shall not apply to pesticides subject to the Federal Insecticide, Fungicide, and Rodenticide Act, nor to foods, drugs and cosmetics subject to the Federal Food, Drug, and Cosmetic Act, nor to substances intended for use as fuels when stored in containers and used in the heating, cooking, or refrigeration system of a house, nor to tobacco and tobacco products, but such term shall apply to any article which is not itself a pesticide within the meaning of the Federal Insecticide, Fungicide, and Rodenticide Act but which is a hazardous substance within the meaning of paragraph (1) of this subsection by reason of bearing or containing such a pesticide.

(3) The term "hazardous substance" shall not include any source material, special nuclear material, or byproduct material as defined in the Atomic Energy Act of 1954, as amended, and regulations issued pursuant thereto by the Atomic Energy Commission.

(g) The term "toxic" shall apply to any substance (other than a radioactive substance) which has the capacity to produce personal injury or illness to man through ingestion, inhalation, or absorption through any body surface.

(h) (1) The term "highly toxic" means any substance which falls within any of the following categories: (a) Produces death within fourteen days in half or more than half of a group of ten or more laboratory white rats each weighing between two hundred and three hundred grams, at a single dose of fifty milligrams or less per kilogram of body weight, when orally administered; or (b) produces death within fourteen days in half or more than half of a group of ten or more laboratory white rats each weighing between two hundred and three hundred grams, when inhaled continuously for a period of one hour or less at an atmospheric concentration of two hundred parts per million by volume or less of gas or vapor or two milligrams per liter by volume or less of mist or dust, provided such concentration is likely to be encountered by man when the substance is used in any reasonably foreseeable manner; or (c) produces death within fourteen days in half or more than half of a group of ten or more rabbits tested in a dosage of two hundred milligrams or less per kilogram of body weight, when administered by continuous contact with the bare skin for twenty-four hours or less.

(2) If the Commission finds that available data on human experience with any substance indicate results different from those obtained on animals in the above-named dosages or concentrations, the human data shall take precedence.

(i) The term "corrosive" means any substance which in contact with living tissue will cause destruction of tissue by chemical action; but shall not refer to action on inanimate surfaces.

(j) The term "irritant" means any substance not corrosive within the meaning of subparagraph (i) of this section which on immediate, prolonged, or repeated contact with normal living tissue will induce a local inflammatory reaction.

(k) The term "strong sensitizer" means a substance which will cause on normal living tissue through an allergic or photodynamic process a hypersensitivity which becomes evident on reapplication of the same substance and which is designated as such by the Commission. Before designating any substance as a strong sensitizer, the Commission, upon consideration of the frequency of occurrence and severity of the reaction, shall find that the substance has a significant potential for causing hypersensitivity.

(l) (1) The terms "extremely flammable", "flammable", and "combustible" as applied to any substance, liquid, solid, or the content of a self-pressurized container shall be defined by regulations issued by the Commission.

(2) The test methods found by the Commission to be generally applicable for defining the flammability or combustibility characteristics of any such substance shall also be specified in such regulations.

(3) In establishing definitions and test methods related to flammability and combustibility, the Commission shall consider the existing definitions and test methods of other Federal agencies involved in the regulation of flammable and combustible substances in storage, transportation and use; and to the extent possible, shall establish compatible definitions and test methods.

(4) Until such time as the Commission issues a regulation under paragraph (1) defining the term "combustible" as applied to liquids, such term shall apply to any liquid which has a flash point above eighty degrees Fahrenheit to and including one hundred and fifty degrees, as determined by the Tagliabue Open Cup Tester.

(m) The term "radioactive substance" means a substance which emits ionizing radiation.

(n) The term "label" means a display of written, printed, or graphic matter upon the immediate container of any substance or, in the case of an article which is unpackaged or is not packaged in an immediate container intended or suitable for delivery to the ultimate consumer, a display of such matter directly upon the article involved or upon a tag or other suitable material affixed thereto; and a requirement made by or under authority of this chapter that any word, statement, or other information appear on the label shall not be considered to be complied with unless such word, statement, or other information also appears (1) on the outside container or

wrapper, if any there be, unless it is easily legible through the outside container or wrapper and (2) on all accompanying literature where there are directions for use, written or otherwise.

(o) The term "immediate container" does not include package liners.

(p) The term "misbranded hazardous substance" means a hazardous substance (including a toy, or other article intended for use by children, which is a hazardous substance, or which bears or contains a hazardous substance in such manner as to be susceptible of access by a child to whom such toy or other article is entrusted) intended, or packaged in a form suitable, for use in the household or by children, if the packaging or labeling of such substance is in violation of an applicable regulation issued pursuant to section 1472 or 1473 of this title or if such substance, except as otherwise provided by or pursuant to section 1262 of this title, fails to bear a label –

(1) which states conspicuously (A) the name and place of business of the manufacturer, packer, distributor or seller; (B) the common or usual name or the chemical name (if there be no common or usual name) of the hazardous substance or of each component which contributes substantially to its hazard, unless the Commission by regulation permits or requires the use of a recognized generic name; (C) the signal word "DANGER" on substances which are extremely flammable, corrosive, or highly toxic; (D) the signal word "WARNING" or "CAUTION" on all other hazardous substances; (E) an affirmative statement of the principal hazard or hazards, such as "Flammable", "Combustible", "Vapor

Harmful", "Causes Burns", "Absorbed Through Skin", or similar wording descriptive of the hazard; (F) precautionary measures describing the action to be followed or avoided, except when modified by regulation of the Commission pursuant to section 1262 of this title; (G) instruction, when necessary or appropriate, for first-aid treatment; (H) the word "poison" for any hazardous substance which is defined as "highly toxic" by subsection (h) of this section; (I) instructions for handling and storage of packages which require special care in handling or storage; and (J) the statement (i) "Keep out of the reach of children" or its practical equivalent, or, (ii) if the article is intended for use by children and is not a banned hazardous substance, adequate directions for the protection of children from the hazard, and

(2) on which any statements required under subparagraph (1) of this paragraph are located prominently and are in the English language in conspicuous and legible type in contrast by typography, layout, or color with other printed matter on the label.

The term "misbranded hazardous substance" also includes a household substance as defined in section 1471(2)(C) of this title if it is a substance described in paragraph (1) of subsection (f) of this section and its packaging or labeling is in violation of an applicable regulation issued pursuant to section 1472 or 1473 of this title.

(q) (1) The term "banned hazardous substance" means (A) any toy, or other article intended for use by children, which is a hazardous substance, or which bears or contains a

hazardous substance in such manner as to be susceptible of access by a child to whom such toy or other article is entrusted; or (B) any hazardous substance intended, or packaged in a form suitable, for use in the household, which the Commission by regulation classifies as a "banned hazardous substance" on the basis of a finding that, notwithstanding such cautionary labeling as is or may be required under this chapter for that substance, the degree or nature of the hazard involved in the presence or use of such substance in households is such that the objective of the protection of the public health and safety can be adequately served only by keeping such substance, when so intended or packaged, out of the channels of interstate commerce: Provided, That the Commission, by regulation, (i) shall exempt from clause (A) of this paragraph articles, such as chemical sets, which by reason of their functional purpose require the inclusion of the hazardous substance involved or necessarily present an electrical, mechanical, or thermal hazard, and which bear labeling giving adequate directions and warnings for safe use and are intended for use by children who have attained sufficient maturity, and may reasonably be expected, to read and heed such directions and warnings, and (ii) shall exempt from clause (A), and provide for the labeling of, common fireworks (including toy paper caps, cone fountains, cylinder fountains, whistles without report, and sparklers) to the extent that it determines that such articles can be adequately labeled to protect the purchasers and users thereof.

(2) Proceedings for the issuance, amendment, or repeal of regulations pursuant to clause

(B) of paragraph (1) of this subsection shall be governed by the provisions of sections 371(e), (f), and (g) of Title 21: Provided, That if the Commission finds that the distribution for household use of the hazardous substance involved presents an imminent hazard to the public health, it may by order published in the Federal Register give notice of such finding, and thereupon such substance when intended or offered for household use, or when so packaged as to be suitable for such use, shall be deemed to be a "banned hazardous substance" pending the completion of proceedings relating to the issuance of such regulations.

(r) An article may be determined to present an electrical hazard if, in normal use or when subjected to reasonably foreseeable damage or abuse, its design or manufacture may cause personal injury or illness by electric shock.

(s) An article may be determined to present a mechanical hazard if, in normal use or when subjected to reasonably foreseeable damage or abuse, its design or manufacture presents an unreasonable risk of personal injury or illness (1) from fracture, fragmentation, or disassembly of the article, (2) from propulsion of the article (or any part or accessory thereof), (3) from points or other protrusions, surfaces, edges, openings, or closures, (4) from moving parts, (5) from lack or insufficiency of controls to reduce or stop motion, (6) as a result of self-adhering characteristics of the article, (7) because the article (or any part or accessory thereof) may be aspirated or ingested, (8) because of instability, or (9) because of any other aspect of the article's design or manufacture.

(t) An article may be determined to present a thermal hazard if, in normal use or when subjected to reasonably foreseeable damage or abuse, its design or manufacture presents an unreasonably [sic] risk of personal injury or illness because of heat as from heated parts, substances or surfaces.

APPENDIX H

s 1262. Declaration of hazardous substances

(a) Declaration of hazardous substances by regulation; review

(1) Whenever in the judgment of the Commission such action will promote the objectives of this chapter by avoiding or resolving uncertainty as to its application, the Commission may by regulation declare to be a hazardous substance, for the purposes of this chapter, any substance or mixture of substances which it finds meets the requirements of subparagraph (1) (A) of section 1261(f) of this title.

(2) Proceedings for the issuance, amendment, or repeal of regulations under this subsection and the admissibility of the record of such proceedings in other proceedings, shall in all respects be governed by the provisions of section 371(e), (f), and (g) of Title 21, except that –

(A) the Commission's order after public hearing (acting upon objections filed to an order made prior to hearing) shall be subject to the requirements of section 348(f) (2) of Title 21; and

(B) the scope of judicial review of such order shall be in accordance with the fourth sentence of paragraph (2), and with the provisions of paragraph (3) of section 348(g) of Title 21.

(b) Reasonable variations or additional label requirements

If the Commission finds that the requirements of section 1261(p) (1) of this title are not adequate for the protection of the public health and safety in view of the special hazard presented by any particular hazardous substance, it may by regulation establish such reasonable variations or additional label requirements as it finds necessary for the protection of the public health and safety; and any such hazardous substance intended, or packaged in a form suitable, for use in the household or by children, which fails to bear a label in accordance with such regulations shall be deemed to be a misbranded hazardous substance.

(c) Exemption from requirements by regulation

If the Commission finds that, because of the size of the package involved or because of the minor hazard presented by the substance contained therein, or for other good and sufficient reasons, full compliance with the labeling requirements otherwise applicable under this chapter is impracticable or is not necessary for the adequate protection of the public health and safety, the Commission shall promulgate regulations exempting such substance from these requirements to the extent it determines to be consistent with adequate protection of the public health and safety.

(d) Exemption from requirements of this chapter of substances or containers adequately regulated by other provisions of law

The Commission may exempt from the requirements established by or pursuant to this chapter any hazardous substance or container of a hazardous substance with respect to which it finds that adequate requirements satisfying the purposes of this chapter have been established by or pursuant to any other Act of Congress.

(e) Regulation of toys or articles intended for use by children

(1) A determination by the Commission that a toy or other article intended for use by children presents an electrical, mechanical, or thermal hazard shall be made by regulation in accordance with the procedures prescribed by section 553 (other than clause (B) of the last sentence of subsection (b) of such section) of Title 5 unless the Commission elects the procedures prescribed by subsection (e) of section 371 of Title 21, in which event such subsection and subsections (f) and (g) of such section 371 of Title 21 shall apply to the making of such determination. If the Commission makes such election, it shall publish that fact with the proposal required to be published under paragraph (1) of such subsection (e).

(2) If, before or during a proceeding pursuant to paragraph (1) of this subsection, the Commission finds

that, because of an electrical, mechanical, or thermal hazard, distribution of the toy or other article involved presents an imminent hazard to the public health and it, by order published in the Federal Register, gives notice of such finding, such toy or other article shall be deemed to be a banned hazardous substance for purposes of this chapter until the proceeding has been completed. If not yet initiated when such order is published, such a proceeding shall be initiated as promptly as possible.

(3)(A) In the case of any toy or other article intended for use by children which is determined by the Commission, in accordance with section 553 of Title 5, to present an electrical, mechanical, or thermal hazard, any person who will be adversely affected by such a determination may, at any time prior to the 60th day after the regulation making such determination is issued by the Commission, file a petition with the United States Court of Appeals for the circuit in which such person resides or has his principal place of business for a judicial review of such determination. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Commission or other officer designated by it for that purpose. The Commission shall file in the court the record of the proceedings on which the Commission based its determination, as provided in section 2112 of Title 28.

(B) If the petitioner applies to the court for leave to adduce additional evidence, and shows to the satisfaction of the court that such additional evidence is material and that there was no opportunity to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence (and evidence in rebuttal thereof) to be taken before the Commission in a hearing

or in such other manner, and upon such terms and conditions, as to the court may seem proper. The Commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, and its recommendation, if any, for the modification or setting aside of its original determination, with the return of such additional evidence.

(C) Upon the filing of the petition under this paragraph, the court shall have jurisdiction to review the determination of the Commission in accordance with subparagraphs (A), (B), (C), and (D) of paragraph (2) of the second sentence of section 706 of Title 5. If the court ordered additional evidence to be taken under subparagraph (B) of this paragraph, the court shall also review the Commission's determination to determine if, on the basis of the entire record before the court pursuant to subparagraphs (A) and (B) of this paragraph, it is supported by substantial evidence. If the court finds the determination is not so supported, the court may set it aside. With respect to any determination reviewed under this paragraph, the court may grant appropriate relief pending conclusion of the review proceedings, as provided in section 705 of Title 5.

(D) The judgment of the court affirming or setting aside, in whole or in part, any such determination of the Commission shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification, as provided in section 1254 of Title 28.

(f) Proceeding for promulgation of regulations

A proceeding for the promulgation of a regulation under section 1261(q)(1) of this title classifying an article or substance as a banned hazardous substance or a regulation under subsection (e) of this section shall be commenced by the publication in the Federal Register of an advance notice of proposed rulemaking which shall –

(1) identify the article or substance and the nature of the risk of injury associated with the article or substance;

(2) include a summary of each of the regulatory alternatives under consideration by the Commission (including voluntary standards);

(3) include information with respect to any existing standard known to the Commission which may be relevant to the proceedings, together with a summary of the reasons why the Commission believes preliminarily that such standard does not eliminate or adequately reduce the risk of injury identified in paragraph (1);

(4) invite interested persons to submit to the Commission, within such period as the Commission shall specify in the notice (which period shall not be less than 30 days or more than 60 days after the date of publication of the notice), comments with respect to the risk of injury identified by the Commission, the regulatory alternatives being considered, and other possible alternatives for addressing the risk;

(5) invite any person (other than the Commission) to submit to the Commission, within such period as the Commission shall specify in the notice (which period shall not be less than

30 days after the date of publication of the notice), an existing standard or a portion of a standard as a proposed regulation under section 1261(q)(1) of this title or subsection (e) of this section; and

(6) invite any person (other than the Commission) to submit to the Commission, within such period as the Commission shall specify in the notice (which period shall not be less than 30 days after the date of publication of the notice), a statement of intention to modify or develop a voluntary standard to address the risk of injury identified in paragraph (1) together with a description of a plan to modify or develop the standard.

The Commission shall transmit such notice within 10 calendar days to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Energy and Commerce of the House of Representatives.

(g) Publication of submitted standard as proposed regulation

(1) If the Commission determines that any standard submitted to it in response to an invitation in a notice published under subsection (f)(5) of this section if promulgated (in whole, in part, or in combination with any other standard submitted to the Commission or any part of such a standard) as a regulation under section 1261(q)(1) of this title or subsection (e) of this section, as the case may be, would eliminate or adequately reduce the risk of injury identified in the notice provided under subsection (f)(1) of this section, the Commission may

publish such standard, in whole, in part, or in such combination and with nonmaterial modifications, as a proposed regulation under such section or subsection.

(2) If the Commission determines that –

(A) compliance with any standard submitted to it in response to an invitation in a notice published under subsection (f)(6) of this section is likely to result in the elimination or adequate reduction of the risk of injury identified in the notice, and

(B) it is likely that there will be substantial compliance with such standard, the Commission shall terminate any proceeding to promulgate a regulation under section 1261(q)(1) of this title or subsection (e) of this section, respecting such risk of injury and shall publish in the Federal Register a notice which includes the determination of the Commission and which notifies the public that the Commission will rely on the voluntary standard to eliminate or reduce the risk of injury, except that the Commission shall terminate any such proceeding and rely on a voluntary standard only if such voluntary standard is in existence. For purposes of this section, a voluntary standard shall be considered to be in existence when it is finally approved by the organization or other person which developed such standard, irrespective of the effective date of the standard. Before relying upon any voluntary standard, the Commission shall afford interested persons (including manufacturers, consumers and consumer organizations) a reasonable opportunity to submit written comments regarding such standard. The

Commission shall consider such comments in making any determination regarding reliance on the involved voluntary standard under this subsection.

(3) The Commission shall devise procedures to monitor compliance with any voluntary standards –

(A) upon which the Commission has relied under paragraph (2) of this subsection;

(B) which were developed with the participation of the Commission; or

(C) whose development the Commission has monitored.

(h) Publication of proposed rule with preliminary regulatory analysis

No regulation under section 1261(q)(1) of this title classifying an article or substance as a banned hazardous substance and no regulation under subsection (e) of this section may be proposed by the Commission unless, not less than 60 days after publication of the notice required in subsection (f) of this section, the Commission publishes in the Federal Register the text of the proposed rule, including any alternatives, which the Commission proposes to promulgate, together with a preliminary regulatory analysis containing –

(1) a preliminary description of the potential benefits and potential costs of the proposed regulation, including any benefits or costs that cannot be quantified in monetary terms, and an identification of those likely to receive the benefits and bear the costs;

(2) a discussion of the reasons any standard or portion of a standard submitted to the Commission under subsection (f)(5) of this section was not published by the Commission as the proposed regulation or part of the proposed regulation;

(3) a discussion of the reasons for the Commission's preliminary determination that efforts proposed under subsection (f)(6) of this section and assisted by the Commission as required by section 2054(a)(3) of this title would not, within a reasonable period of time, be likely to result in the development of a voluntary standard that would eliminate or adequately reduce the risk of injury identified in the notice provided under subsection (f)(1) of this title; and

(4) a description of any reasonable alternatives to the proposed regulation, together with a summary description of their potential costs and benefits, and a brief explanation of why such alternatives should not be published as a proposed regulation.

The Commission shall transmit such notice within 10 calendar days to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Energy and Commerce of the House of Representatives.

(i) Final regulatory analysis; publication; review

(1) The Commission shall not promulgate a regulation under section 1261(q)(1) of this title classifying an article or substance as a banned hazardous substance or a regulation under subsection (e) of this section unless it

has prepared a final regulatory analysis of the regulation containing the following information:

(A) A description of the potential benefits and potential costs of the regulation, including costs and benefits that cannot be quantified in monetary terms, and the identification of those likely to receive the benefits and bear the costs.

(B) A description of any alternatives to the final regulation which were considered by the Commission, together with a summary description of their potential benefits and costs and a brief explanation of the reasons why these alternatives were not chosen.

(C) A summary of any significant issues raised by the comments submitted during the public comment period in response to the preliminary regulatory analysis, and a summary of the assessment by the Commission of such issues.

The Commission shall publish its final regulatory analysis with the regulation.

(2) The Commission shall not promulgate a regulation under section 1261(q)(1) of this title classifying an article or substance as a banned hazardous substance or a regulation under subsection (e) of this section unless it finds (and includes such finding in the regulation) –

(A) in the case of a regulation which relates to a risk of injury with respect to which persons who would be subject to such regulation have adopted and implemented a voluntary standard, that –

(i) compliance with such voluntary standard is not likely to result in

the elimination or adequate reduction of such risk of injury; or

(ii) it is unlikely that there will be substantial compliance with such voluntary standard;

(B) that the benefits expected from the regulation bear a reasonable relationship to its costs; and

(C) that the regulation imposes the least burdensome requirement which prevents or adequately reduces the risk of injury for which the regulation is being promulgated.

(3) (A) Any regulatory analysis prepared under subsection (h) of this section or paragraph (1) shall not be subject to independent judicial review, except that when an action for judicial review of a regulation is instituted, the contents of any such regulatory analysis shall constitute part of the whole rulemaking record of agency action in connection with such review.

(B) The provisions of subparagraph (A) shall not be construed to alter the substantive or procedural standards otherwise applicable to judicial review of any action by the Commission.

(j) Petition to initiate rulemaking

The Commission shall grant, in whole or in part, or deny any petition under section 553(e) of Title 5, requesting the Commission to initiate a rulemaking, within a reasonable time after the date on which such petition is filed. The Commission shall state the reasons for granting or denying such petition. The Commission may not deny

any such petition on the basis of a voluntary standard unless the voluntary standard is in existence at the time of the denial of the petition, the Commission has determined that the voluntary standard is likely to result in the elimination or adequate reduction of the risk of injury identified in the petition, and it is likely that there will be substantial compliance with the standard.

APPENDIX I

15 U.S.C. §1261, HISTORICAL NOTE

(b) (1) (A) Except as provided in paragraphs (2) and (3), if a hazardous substance or its packaging is subject to a cautionary labeling requirement under § 2(p) or 3(b) [15 U.S.C. § 1261(p) or § 1262(p)] designed to prevent against a risk of illness or injury associated with the substance, no State or political subdivision of a State may establish or continue in effect a cautionary labeling requirement applicable to said substance or packaging and designed to protect against the same risk of illness or injury unless such cautionary labeling requirement is identical to the labeling requirement under 2(p) or 3(b).

(B) Except as provided in paragraphs (2), (3), and (4), if under regulations of the Commission promulgated under or for the enforcement of section 2(g) [subsec. (g) of this section] a requirement is established to protect against a risk of illness or injury associated with a hazardous substance, no State or political subdivision or a state may establish or continue in effect a requirement applicable to such substance and designed to protect against the same risk of illness or injury unless such requirement is identical to the requirement established under such regulations.

15 U.S.C. § 1261, Historical Note – Effect upon Federal and State Law – Pub.L. 86-613, §18, formerly 17, July 12, 1960, 74 Stat. 380, as amended Pub.L. 89-756, §4 (a), Nov. 3, 1966, 80 Stat. 1305; renumbered and amended Pub.L. 91-113, §4(a), (b) (1), Nov. 6, 1969, 83 Stat. 189, 190; Pub.L. 94-284, §17(a), May 11, 1976, 90 Stat. 510.

(2)

No. 94-1228

Supreme Court, U.S.
FILED
FEB 10 1995
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

SANDRA SALAZAR,

Petitioner,

vs.

WHINK PRODUCTS CO., an Iowa Corporation,

Respondent.

On Petition for Writ of Certiorari to the Colorado Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

J. RONALD VOSS
Counsel of Record
AMELIA L. KLEMME
RETHERFORD, MULLEN,
JOHNSON & BRUCE
Attorneys for Respondent
P.O. Box 1580
415 South Sahwatch
Colorado Springs, CO 80901-1580
(719) 475-2014

6294
Lutz Appellate Services, inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

BEST AVAILABLE COPY

QUESTIONS PRESENTED FOR REVIEW

Whether the preemption provision of the Federal Hazardous Substances Act, 15 U.S.C. § 1261 *et seq.* bars Petitioner's failure to warn tort claims against Respondent, a manufacturer whose product label undisputedly complied with the labeling requirements of the Federal Hazardous Substances Act.

Whether, on Petitioner's Petition for Rehearing, the Colorado Court of Appeals abused its discretion in not remanding this matter to the trial court so that Petitioner could further amend her Amended Complaint to assert a new and different theory of relief against the Respondent.

TABLE OF CONTENTS

Page

Questions Presented for Review i

Table of Contents ii

Table of Citations iii

Opinions Below 1

Statement of the Case 1

Stage at Proceedings Federal Questions Were Raised 2

Reasons for Denying the Writ 2

I. The Colorado Court of Appeals, consistent with the other jurisdictions which have addressed this issue, correctly held that the Federal Hazardous Substances Act preempts Petitioner's failure to warn claims against the Respondent whose label complied therewith. 2

II. The Colorado Court of Appeals did not abuse its discretion in denying Petitioner's request for remand contained in her Petition for Rehearing. .. 7

Conclusion 11

Contents

Page

TABLE OF CITATIONS

Cases Cited:

A.O. Smith Harvestore Products, Inc. v. Kallsen, 817 P.2d 1038 (Colo. 1991) 6, 9

Alzado v. Blinder, Robinson & Co., Inc., 752 P.2d 544 (Colo. 1988) 7

Arkansas-Platte & Gulf Partnership v. Van Waters & George, Inc., 981 F.2d 1177 (10th Cir. 1993), *cert. denied*, __ U.S. __, 114 S. Ct. 60, 126 L. Ed. 2d 30 (1993) 4

Chemical Specialties Manufacturers Association, Inc. v. Clark, 482 F.2d 325 (5th Cir. 1973) 4, 8

Cipollone v. Liggett Group, Inc. __ U.S. __, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992) 3, 4, 5, 7, 10

Cosmetic, Toiletry and Fragrance Association, Inc. v. State of Minnesota, 440 F. Supp. 1216 (D. Minn. 1977), *aff'd*, 575 F.2d 1256 (8th Cir. 1978) 4, 8

Flader v. Simonsen, 148 Colo. 480, 366 P.2d 678 (1962) . 7

Gibbons v. Ogden, 9 Wheat. 1, 22 U.S. 1, 6 L. Ed. 23 (1824) 3

Grasmick v. Otis Elevator Co., 817 F.2d 88 (10th Cir. 1987) 7, 10

Contents

Page

Independent Wireless Telegraph Co. v. Radio Corporation of America, 270 U.S. 84, 46 S. Ct. 224, 70 L. Ed. 481 (1926) 8

Jenkins v. James B. Day & Co., 634 N.E. 2d 998 (Ohio 1994) 4, 5, 6

Kerotest Mfg. Co. v. C-O-Two Fire Equipment Co., 342 U.S. 180, 72 S. Ct. 219, 96 L. Ed. 200 (1952) 8

King v. E.I. Dupont De Nemours & Co., 996 F.2d 1364 (1st Cir. 1993) 5

MacDonald v. Monsanto Co., 27 F.3d 1021 (5th Cir. 1994) 5

M'Culloch v. State, 4 Wheat. 316, 17 U.S. 316, 4 L. Ed. 579 (1819) 8

Miller v. East Denver Municipal Irrigation District, 83 Colo. 406, 266 P. 211 (1928) 7, 9, 10

Minnich v. Gardner, 292 U.S. 48, 54 S. Ct. 567, 78 L. Ed. 1116 (1934) 9

Moss v. Parks Corp., 985 F.2d 736 (4th Cir. 1993), *cert. denied*, __ U.S. __, 113 S. Ct. 2999, 125 L. Ed. 2d 693 (1993) 4

Neely v. Martin K. Eby Const. Co., 386 U.S. 317, 87 S. Ct. 1072, 18 L. Ed. 2d 75 (1967) 6

Contents

	Page
Papas v. Upjohn Company, 985 F.2d 516 (11th Cir. 1993), *cert. denied*, __ U.S. __, 114 S. Ct. 300, 126 L. Ed. 2d 248 (1993)	5
People v. Gaskins, 825 P.2d 30 (Colo. 1992)	8
Perkins v. Flatiron Structures Co., 849 P.2d 832 (Colo. App. 1992)	10
Salazar v. Whink Products Co., 881 P.2d 431 (Colo. App. 1994)	1
Shaw v. Dow Brands, Inc., 994 F.2d 364 (7th Cir. 1993)	5
State v. A.J. Seier, 871 S.W. 2d 611 (Mo. App. 1994)	4
Seven Lakes Reservoir Co. v. New Loveland & The Greeley Irrigation Land Co., 40 Colo. 382, 93 P. 485 (1907)	8
Worm v. American Cyanamid Co., 5 F.3d 744 (4th Cir. 1993)	5
Statute Cited:	
15 U.S.C. § 1261 *et seq.*	i, 1
Other Authorities Cited:	
1969 Cigarette Act	4

Contents

Page

APPENDIX

Appendix A — Opinion of the District Court, City and County of Denver, Colorado Dated September 14, 1992 ..... 1a

Appendix B — Decision of Colorado Court of Appeals Dated April 7, 1994 ..... 15a

OPINIONS BELOW

1. The trial court's opinion upon Respondent's Motion for Summary Judgment appears as Appendix A.

2. The Colorado Court of Appeals' decision of *Salazar v. Whink Products Co.*, 881 P.2d 431 (Colo. App. 1994) appears as Appendix B.

STATEMENT OF THE CASE

This personal injury action brought by Petitioner against Respondent Whink Products Company (improperly captioned as "Whink Products Co.") arises out of Petitioner's misuse of Respondent's product, Whink Rust Stain Remover. It is undisputed that this product contained warnings in compliance with he Federal Hazardous Substances Act, 15 U.S.C. § 1261 *et seq.* These warnings advised Petitioner not to use the product without heavy duty gloves and that the product could cause severe burns which may not be immediately painful or visible. Petitioner admitted that she read and understood these warnings but then chose to ignore them, thereby causing her own injuries. It is undisputed that Petitioner's common law tort claims against Respondent were solely based on the alleged inadequacy of the Respondent's warnings, even though said warnings complied with the Federal Hazardous Substances Act.

At the trial court, Respondent Whink moved for summary judgment on two issues: (1) misuse and (2) federal preemption. The trial court entered summary judgment in favor of Respondent on its misuse defense. On appeal, the Colorado Court of Appeals upheld the trial court's ruling on the grounds that Petitioner's failure to warn claims were preempted by the Federal Hazardous Substances Act, 15 U.S.C. § 1261 *et seq.* and Respondent's undisputed compliance therewith.

STAGE AT PROCEEDINGS FEDERAL QUESTIONS WERE RAISED

Petitioner asserts that the issue of preemption was first raised by Respondent in its Motion for Summary Judgment filed January 7, 1992. This is in error.

A review of the record establishes that Respondent specifically raised the doctrine of federal preemption on June 21, 1991 in its Supplements and Amendments to its Disclosure Certificate. (Vol. 1, pp. 104-130). Thereafter, on or about September 25, 1991, Respondent reiterated this defense in its Answer to Petitioner's Amended Complaint. (Vol. 1, pp. 183-186). Hence, despite Petitioner's assertions to the contrary, Petitioner was on notice of Respondent's defense in this regard at least as of June 21, 1991, if not earlier.

REASONS FOR DENYING THE WRIT

I.

THE COLORADO COURT OF APPEALS, CONSISTENT WITH THE OTHER JURISDICTIONS WHICH HAVE ADDRESSED THIS ISSUE, CORRECTLY HELD THAT THE FEDERAL HAZARDOUS SUBSTANCES ACT PREEMPTS PETITIONER'S FAILURE TO WARN CLAIMS AGAINST THE RESPONDENT WHOSE LABEL COMPLIED THEREWITH.

It is undisputed that Whink Rust Stain Remover is governed by the Federal Hazardous Substances Act ("FHSA"). It is also undisputed that Respondent complied with all of the regulations promulgated under FHSA. (Vol. 1, pp. 249, 262-279, 280-282). Further, it is undisputed that Respondent worked directly with the

Consumer Products Safety Commission or its predecessor on its labeling requirements since 1962 and that it has complied with all label and warning requirements of the appropriate agency. (Vol. 1, pp. 249, 262-279, 280-282). In fact, as the Colorado Court of Appeals noted, the parties did not dispute that the label on Whink Rust Stain Remover comported with the FHSA's labeling requirements. (Colorado Court of Appeals' Opinion, Appendix B, p. 16a).

Further, regardless of how Petitioner now styles her claims, the basis of her claims before the trial court and before the Colorado Court of Appeals was that Respondent's label and warning instructions on the Whink Rust Stain Remover were defective. (Vol. 5, p. 27 — Argument of Petitioner's counsel before the trial court; Petitioner's Opening Brief filed with the Court of Appeals, p. 12 and pp. 17-19 wherein Petitioner admits that the basis of her Amended Complaint was inadequate warning and that this is a failure to warn case). Both the trial court and the Colorado Court of Appeals so found. (Trial court's opinion, Appendix A, p. 5a; Colorado Court of Appeals' Opinion, Appendix B, p. 16a.)

Thus, in essence, in the case at bar, Petitioner wanted a jury to establish a standard for Respondent beyond those standards mandated by the United States government pursuant to FHSA. The Colorado Court of Appeals therefore correctly concluded that FHSA preempted Petitioner's failure to warn claims under these circumstances.

In so doing, the Colorado Court of Appeals first noted that state laws which "interfere with and/or are contrary to the laws of the Congress, made in pursuance of the Constitution," are invalid, citing the case of *Gibbons v. Ogden*, 9 Wheat. 1, 22 U.S. 1, 6 L. Ed. 23 (1824). The Court of Appeals then examined this Court's opinion in *Cipollone v. Liggett Group, Inc.*, ___ U.S. ___,

112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992). Given the *Cipollone* case, the Colorado Court of Appeals appropriately held that Petitioner would have to show that FHSA's preemption provision was less sweeping than the language of the 1969 Cigarette Act in order to avoid judgment in Respondent's favor. The Petitioner failed in this regard as the Colorado Court of Appeals could discern no significant difference between the two.

Hence, finding persuasive the analysis of the Fourth Circuit in *Moss v. Parks Corp.*, 985 F.2d 736 (4th Cir. 1993), *cert. denied*, ___ U.S. ___, 113 S. Ct. 2999, 125 L. Ed. 2d 693 (1993), the Colorado Court of Appeals properly concluded that the FHSA preempted Petitioner's common law failure to warn claims against the Respondent because she sought additional and/or more clearly stated warnings that those required of Respondent by the FHSA. In fact, the Colorado Court of Appeals' holding in this regard is in line with all of the case law on this issue, whether issued before or after the *Cipollone* case. *Moss v. Parks Corp., supra; Chemical Specialties Manufacturers Association, Inc. v. Clark,* 482 F.2d 325 (5th Cir. 1973); *Cosmetic, Toiletry and Fragrance Association, Inc. v. State of Minnesota,* 440 F. Supp. 1216 (D. Minn. 1977), *aff'd,* 575 F.2d 1256 (8th Cir. 1978); *Jenkins v. James B. Day & Co.,* 634 N.E.2d 998 (Ohio 1994); *State v. A.J. Seier,* 871 S.W.2d 611 (Mo. App. 1994).

In addition, in the *Moss* case, the Fourth Circuit Court of Appeals noted that "the preemption issues arising under the Federal Hazardous Substance Act are identical to those arising under the Federal Insecticide, Fungicide and Rodenticide Act ('FIFRA'), 7 U.S.C. § 137 *et seq.*" The Tenth Circuit Court of Appeals addressed the preemptive effect of FIFRA in *Arkansas-Platte & Gulf Partnership v. Van Waters & George, Inc.*, 981 F.2d 1177 (10th Cir. 1993), *cert. denied,* ___ U.S. ___, 114 S. Ct. 60, 126 L. Ed. 2d 30 (1993). There, the Tenth Circuit Court of Appeals held that the FIFRA preemption provision preempted

common law tort actions based upon a failure to warn. This holding is in keeping with all of he circuit courts which have considered this issue since the *Cipollone* decision. *See MacDonald v. Monsanto Co.*, 27 F.3d 1021 (5th Cir. 1994); *Worm v. American Cyanamid Co.*, 5 F.3d 744 (4th Cir. 1993); *King v. E.I. Dupont De Nemours & Co.*, 996 F.2d 1364 (1st Cir. 1993); *Shaw v. Dow Brands, Inc.*, 994 F.2d 364 (7th Cir. 1993). *Papas v. Upjohn Company*, 985 F.2d 516 (11th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 300, 126 L. Ed. 2d 248 (1993). Hence, the Colorado Court of Appeals' opinion in this case on the FHSA is also in line with those jurisdictions which have addressed the preemption issue under FIFRA.

Petitioner cites only one FHSA case as being allegedly to the contrary, *i.e., Jenkins v. James B. Day & Co., supra.* In actuality, this case is completely consistent with the Colorado Court of Appeals' opinion in the case at bar.

In the *Jenkins* case, the Ohio Supreme Court first specifically held that if the evidence showed that the manufacturer had complied with labeling requirements of the FHSA, all tort claims for failure to warn were preempted. *Jenkins v. James B. Day & Co., supra* at 1003, fn. 2 and at 1004. However, in the event the evidence showed that the manufacturer had *not* complied with FHSA requirements, a failure to warn claim could be asserted based upon the manufacturer's *non-compliance* with the FHSA requirements. *Jenkins v. James B. Day & Co., supra* at 1005. Hence, as the *Jenkins* court held, if the evidence showed that the label did comply with the FHSA, summary judgment in favor of the manufacturer would be appropriate. *Jenkins v. James B. Day & Co., supra* at 1004.

In the case at bar, it is undisputed that the Respondent did comply with all of the labeling requirements of the FHSA. In fact, Petitioner has always asserted that Respondent was required to

provide warnings beyond those required under FHSA. (Vol. 5, p. 27 — Argument of Petitioner's counsel before the trial court; Petitioner's Opening Brief filed with the Court of Appeals at p. 19.) For this reason, the Colorado Court of Appeals' opinion in this matter is completely consistent with the Ohio Supreme Court's holding and analysis in the *Jenkins* case.

Finally, Petitioner asserts that the Colorado Court of Appeals applied preemption too broadly as it precluded Petitioner's alleged claims of "negligent design" and that the product simply should have never been marketed, despite its warnings. This argument has no merit.

First, it should be noted that this is the very first time that Petitioner has ever argued that Respondent was negligent in the design of the product. Furthermore, Petitioner did not raise the issue that Respondent should not have marketed the product at all, despite its warnings, until she filed her Petition for Writ of Certiorari with the Colorado Supreme Court. (Petitioner's Petition for Writ of Certiorari filed with Colorado Supreme Court, p. 10). Having failed to raise these issues before the trial court, let alone before the Colorado Court of Appeals, Petitioner cannot raise these issues now. *Neely v. Martin K. Eby Const. Co.*, 386 U.S. 317, 87 S. Ct. 1072, 18 L. Ed. 2d 75 (1967); *A.O. Smith Harvestore Products, Inc. v. Kallsen*, 817 P.2d 1038 (Colo. 1991).

More importantly, these new positions are directly contrary to the position taken by Petitioner before the trial court as well as before the Colorado Court of Appeals. (Vol. 5, p. 27 — Argument of Petitioner's counsel before the trial court; Petitioner's Opening Brief filed with the Court of Appeals, p. 12 and pp. 17-19 wherein Petitioner admits that the basis of her Amended Complaint was inadequate warning and that this is a failure to warn case). Hence, in making this argument, Petitioner now argues a new theory of recovery on appeal which, under Colorado

law, she is not entitled to do. *See Alzado v. Blinder, Robinson & Co., Inc.*, 752 P.2d 544 (Colo. 1988); *Flader v. Simonsen*, 148 Colo. 480, 366 P.2d 678 (1962); *Miller v. East Denver Municipal Irrigation District*, 83 Colo. 406, 266 P. 211 (1928); *see also Grasmick v. Otis Elevator Co.*, 817 F.2d 88 (10th Cir. 1987).

In sum, there is no reason why this Court should grant Petitioner's Petition for Writ of Certiorari. No question exists that the Colorado Court of Appeals' opinion in this matter on the issue of FHSA preemption is in line with every other court decision addressed to this issue. Moreover, as applied by the Colorado Court of Appeals, the FHSA's preemption provision was limited to preempt Petitioner's failure to warn claims against a manufacturer who had complied with the FHSA requirements. Since these were the only claims pursued by the Petitioner before the trial court and the Colorado Court of Appeals, she is therefore not entitled to have this matter remanded to the trial court so that she can now pursue a different theory of recovery against the Respondent.

II.

THE COLORADO COURT OF APPEALS DID NOT ABUSE ITS DISCRETION IN DENYING PETITIONER'S REQUEST FOR REMAND CONTAINED IN HER PETITION FOR REHEARING.

Petitioner argues that the application of the *Cipollone* decision to her is "particularly unfair" and, therefore, pursuant to her Petition for Rehearing, the Colorado Court of Appeals should be ordered to remand this matter to the trial court so that Petitioner can further amend her Amended Complaint and pursue further discovery. Along these lines, Petitioner argues that when she prepared her case, the law was that "compliance with a federal regulation concerning a warning was only one item of evidence which the jury may consider." This argument has no merit.

First, the standard of review regarding the Colorado Court of Appeals' decision not to remand this matter for these purposes is not whether that decision is "particularly unfair," but rather, whether the Colorado Court of Appeals abused its discretion in this regard. *See Kerotest Mfg. Co. v. C-O-Two Fire Equipment Co.*, 342 U.S. 180, 72 S. Ct. 219, 96 L. Ed. 200 (1952); *People v. Gaskins*, 825 P.2d 30 (Colo. 1992). Clearly, it did not.

First, Petitioner's request for a remand to the trial court was not presented to the Colorado Court of Appeals until Petitioner filed her Petition for Rehearing. It is a well-recognized rule that questions not advanced at the original hearing of an appeal will not be considered on the petition for rehearing. *Seven Lakes Reservoir Co. v. New Loveland & The Greeley Irrigation & Land Co.*, 40 Colo. 382, 93 P. 485 (1907); *See Independent Wireless Telegraph Co. v. Radio Corporation of America*, 270 U.S. 84, 46 S. Ct. 224, 70 L. Ed. 481 (1926). Hence, no abuse of discretion could have occurred when the Colorado Court of Appeals failed to remand this matter to the trial court in accordance with Petitioner's request in her Petition for Rehearing.

In addition, despite Petitioner's assertions to the contrary, the doctrine of federal preemption has been in existence and the law in the United States since at least 1819. *M'Culloch v. State*, 4 Wheat. 316, 17 U.S. 316, 4 L. Ed. 579 (1819). Moreover, as of 1973 and 1977, respectively, at least one federal circuit court of appeals and one federal district court had held that the FHSA preempts failure to warn claims against manufacturers who had complied with its provisions. *See Chemical Specialties Manufacturers Association, Inc. v. Clark, supra; Cosmetic, Toiletry and Fragrance Association, Inc. v. State of Minnesota, supra.* Hence, the doctrine of federal preemption and, in particular, as to the FHSA, had been in existence long before Petitioner filed her Complaint in this matter on July 19, 1990.

Further, it is undisputed, in both its Supplements and Amendments to its Disclosure Certificate and its Answer to Petitioner's Amended Complaint, Respondent advised Petitioner that it intended to rely upon the doctrine of federal preemption in this matter. Thereafter, on January 7, 1992, Respondent moved for summary judgment, asserting that its labels had complied with all the federal regulations and labeling requirements. (Vol. 1, pp. 233-234). This assertion was established pursuant to Exhibit A and Exhibit B attached to Respondent's Brief in Support of Motion for Summary Judgment. (Vol. 1, pp. 249, 262-279, 280-282). Prior to Petitioner's Petition for Writ of Certiorari to the Colorado Supreme Court, Petitioner never even argued that Respondent had failed to comply with FHSA, let alone even attempt to establish that a disputed issue of fact existed on this issue. Having failed to do so at the trial court level, Petitioner is not entitled to do so now on appeal. *Minnich v. Gardner,* 292 U.S. 48, 54 S. Ct. 567, 78 L. Ed. 1116 (1934); *A.O. Smith Harvestore Products, Inc. v. Kallsen, supra.*

In addition, the fact that Petitioner's counsel mistakenly decided that Respondent's compliance with the federal regulatory standards was not an essential issue in this litigation and, therefore, did not conduct any discovery on this issue, cannot serve as a basis for allowing Petitioner to further amend her Amended Complaint long after Respondent has been successful on its summary judgment motion on this issue. It is undisputed that Petitioner's counsel was aware that Respondent was relying on a preemption defense since June 31, 1991 and, at the very latest, since January 7, 1992 when Respondent filed its Motion for Summary Judgment. Given that the trial court's Order entering summary judgment in favor of Respondent was not issued until September 14, 1992, Petitioner had more than adequate time to fully address this preemption issue at the trial court level. The fact that she did not do so cannot serve as the basis for allowing her to do so now. *Miller v. East Denver*

Municipal Irrigation Ditch, supra; Perkins v. Flatiron Structures Co., 849 P.2d 832 (Colo. App. 1992); *see Grasmick v. Otis Elevator Co., supra.*

Further, it can hardly be said that the longstanding law of federal preemption "changed" while Respondent's Motion for Summary Judgment or this appeal was pending. Here, in its Brief in Support of its Motion for Summary Judgment, Respondent not only set forth the specific preemption language of FHSA, but cited two specific cases which held that FHSA preempted the states from establishing any different standards. Thus, since at least January 7, 1992, Petitioner has been well aware of the federal case law which was directly contrary to her position at both the trial court and appeals levels.

Finally, the *Cipollone* opinion was issued in June, 1992 and, thereafter, Respondent specifically advised Petitioner that it was relying upon that opinion as to the issue of federal preemption. (Vol. 2, pp. 397-420). Given that the trial court did not enter any Order for summary judgment until September 14, 1992, Petitioner also had more than adequate time to explore the federal preemption issue as affected by the *Cipollone* case at the trial court level.

In sum, Petitioner had more than ample time to pursue the federal preemption issue at the trial court level, but failed to do so. She therefore is not entitled to do so now. In light of this, the Colorado Court of Appeals obviously did not abuse its discretion in denying Petitioner's request in her Petition for Rehearing to remand this matter to the trial court for that purpose.

CONCLUSION

In sum, this Petition for Writ of Certiorari must be denied in this matter because (1) the Colorado Court of Appeals, in line with all the other jurisdictions which have addressed this issue, properly held that Petitioner's claims, as presented here, are preempted by the Federal Hazardous Substances Act and (2) the Colorado Court of Appeals did not abuse its discretion in denying Petitioner's request in her Petition for Rehearing to have this matter remanded to the trial court in order to allow her to further amend her Amended Complaint and to pursue a new theory of recovery against the Respondent.

Respectfully submitted,

J. RONALD VOSS
Counsel of Record
AMELIA L. KLEME
RETHERFORD, MULLEN, JOHNSON & BRUCE
Attorneys for Respondent
415 South Sahwatch
P.O. Box 1580
Colorado Springs, CO 80901-1580
(719) 475-2014

APPENDIX A — OPINION OF THE DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO DATED SEPTEMBER 14, 1992

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO

Case No. 90-CV-7830 Courtroom 21

SANDRA SALAZAR,

Plaintiff,

v.

WHINK PRODUCTS CO., an Iowa corporation and MONTE VISTA ARAPAHOE, INC., dba MONTE VISTA SUPER FOODS, a Colorado Corporation, ROBERT W. SPLETTSTOESSER, M.D., and MONTE VISTA PROFESSIONAL ASSOCIATES,

Defendants.

ORDER

THIS MATTER is before me on a Motion for Summary Judgment filed by Defendant Whink Products Company ("Whink") on January 8, 1992, joined by Defendants Monte Vista Arapahoe, Inc. ("Super Foods"), Robert W. Splettstoesser ("Splettstoesser") and Monte Vista Professional Associates ("Monte Vista"). Based on my review of the Motion and briefs, the affidavits, and the case file, and the hearing held on the Motion on September 10, 1992, I rule as follows.

Appendix A

I. INTRODUCTION

Motions for summary judgment are disfavored, and the allegations of the non-movant must be taken as true unless they are clearly disproved by unrebutted affidavits or products of discovery. *Continental Air Lines, Inc. v. Keenan*, 731 P.2d 708 (Colo. 1987). With this standard in mind, the material facts of this case are as follows.

The case arises out of Plaintiff's allegations that she was injured while using Whink Rust Stain Remover, and that she was thereafter negligently treated for her injuries. At the time of her injuries, Plaintiff had been in the professional cleaning business for 11 years. She cleaned offices as well as private residences. In July 1989, Plaintiff visited Defendant Super Foods for the purpose of purchasing a window cleaner, apparently to use on some water stained windows in Plaintiff's own home. In reliance on a specific recommendation of the owner of the Super Foods store, Plaintiff purchased a bottle of Whink Rust Stain Remover. Whink Rust Stain Remover is a cleaning fluid designed to remove rust stains from fabrics and well as sinks and toilet bowls. It is 8% hydrofluoric acid.

The bottle which Plaintiff purchased contained the following warnings on the front of the bottle (emphasis in original):

> Not a general purpose rust remover.
>
> Read precautions and directions before using.
>
> DANGER: MAY BE FATAL OR CAUSE PERMANENT DAMAGE. CAUSES

Appendix A

SEVERE BURNS WHICH MAY NOT BE IMMEDIATELY PAINFUL OR VISIBLE. VAPORS HARMFUL. CONTAINS HYDROFLUORIC ACID. KEEP OUT OF REACH OF CHILDREN. Use Only With Heavy Duty Household Rubber Gloves. Read back panel for additional pre-cautions and directions.

The back of the bottle was marked at the top with skulls and crossbones and the following warning (emphasis in original):

DANGER-POISON
AVOID CONTRACT WITH SKIN OR EYES.
DO NOT TASTE, SWALLOW OR BREATHE.

The back also contained certain general instructions on use, as well as medical instructions should the product be swallowed or come in contact with the skin or eyes.

Plaintiff read the warnings on the front of the bottle, including the directions to wear rubber gloves, but did not read the warnings on the back until after she sustained her injuries.

Plaintiff spent three hours washing her windows with a Whink-soaked towel wrapped around her unprotected right hand. Later that afternoon, Plaintiff's hand began to burn, she was unable to stop the pain with water, and she was rushed to Dr. Splettstoesser's clinic. Plaintiff claims Splettstoesser negligently misdiagnosed her chemical burns as an allergic reaction, resulting in significant delays in appropriate treatment.

Appendix A

Plaintiff suffered second and third degree burns on her right thumb and forefinger, and underwent two amputative surgeries to her right index finger. Plaintiff has a permanent disability rating, and also suffers from reflex sympathetic dystrophy.

II. CLAIMS AND DEFENSES

Plaintiff asserts the following claims against the following Defendants:

CLAIM	TYPE	DEFENDANT
First	Negligence	Whink
Second	Products liability	Whink
Third	Negligence	Super Foods
Fourth	Breach of implied warranty	Super Foods
Fifth	Exemplary damages	All
Sixth	Medical malpractice	Splettstoesser Monte Vista

At oral argument, Plaintiff's counsel announced that Plaintiff has settled the case with all Defendants except Whink, and that documents reflecting that settlement have been prepared and are in the process of being executed.

Plaintiff seeks in excess of $70,000.00 in medical expenses, damages for past and future lost wages, pain and suffering, and exemplary damages.

Appendix A

Defendants raise two arguments in their Motion: (1) Plaintiff's claims are preempted by the Federal Hazardous Substances Act, 15 U.S.C. §§1261, *et seq.*, and (2) Plaintiff's claims are barred by Plaintiff's misuse. Because I agree that Plaintiff's claims are barred as a matter of law by her own misuse, I do not reach Defendants' preemption argument.

III. THE UNCONTRADICTED FACTS REQUIRE DISMISSAL OF THE FAILURE TO WARN ASPECTS OF PLAINTIFF'S CLAIMS

The strict liability concepts set out in §402A of the Restatement (2d) of Torts, as adopted in Colorado in *Hiigel v. General Motors Corp.*, 190 Colo. 57, 544 P.2d 983 (1975), recognize two general categories of product liability actions — one where the product is claimed to be organically defective, or, in the language of the Restatement, "unreasonably dangerous," and another where the claimed defect is a failure to warn. *See Jackson v. Harsco Corp.*, 673 P.2d 363 (Colo. 1983).

Here, Plaintiff's Amended Complaint confuses these two basic concepts with each other, and also confuses strict liability with negligence, and unreasonable dangerousness with ultrahazardousness.[1] Despite these shortcomings, it is clear that the focus of Plaintiff's strict liability and negligence claims is an alleged failure to warn. *See* Amended Complaint ¶¶ 12(b) and 15. At oral argument, Plaintiff's counsel indicated that the gravamen of Plaintiff's failure to warn case is that Whink failed to give the latent nature of the danger — the fact that the product doesn't burn until long after coming in contact with the skin — adequate prominence, and that Plaintiff's expert would so testify. There are several problems with this argument.

---

1. See Part IV below.

First, Plaintiff has not supported this argument with her expert's report or with transcripts from the expert's deposition. Counsel's mere representations at this stage are insufficient to create a triable issue of fact, in the face of the undisputed presence of just such a warning in what appears to me to be a fairly prominent place on the front of the Whink bottle. *See Sullivan v. Davis*, 172 Colo. 490, 474 P.2d 218 (1970).

More importantly, Plaintiff has admitted not only that she read the warnings contained on the front of the bottle, but that she understood them. *See* excerpts of Plaintiff's Deposition set forth in Part V.B. below. Thus, the warnings, however inadequate, managed to find their way into Plaintiff's consciousness. Any inadequacy could therefore not, as a matter of law, have caused any of Plaintiff's injuries. *See Schultz v. Linden-Alimak, Inc.*, 734 P.2d 146 (Colo. App. 1986).

This is really just a different way of describing the conclusion reached in Part V.B. below; namely, that Plaintiff misused the product by failing to heed the warnings which she admittedly read and appreciated.

IV. WHINK STAIN REMOVER IS NOT "ULTRAHAZARDOUS"

At oral argument, Plaintiff's counsel indicated that his use of the term "ultrahazardous" in his First and Second Claims for Relief was not inartful, but rather that Plaintiff is taking the position that Whink Rust Stain Remover is indeed ultrahazardous in the sense that it triggers absolute liable. Plaintiff's argument in this regard is wholly unsupportable.

Our appellate courts have recognized only two specific

activities as being so "ultrahazardous" as to render the performers of these activities absolutely liable for all damages arising therefrom. Those specific activities are dynamite blasting (*Garden of Gods Village v. Hellman,* 133 Colo. 286, 294 P.2d 597 (1956)) and the impoundment of water (*Garnet Ditch & Reservoir Co. v. Sampson,* 48 Colo. 285, 110 P. 79 (1910)). Indeed, on every occasion since 1956 in which our appellate courts have been asked to expand this doctrine into other areas, they have expressly refused to do so. *Liber v. Flor,* 160 Colo. 7, 415 P.2d 332 (1960) (*storage* of dynamite is not ultrahazardous); *Forrest v. Imperial Distr. Serv. Inc.,* 712 P.2d 488 (Colo. App. 1987), *rev'd on other grds.,* 741 P.2d 1251 (Colo. 1987) (storage and handling of caustic chemicals is not ultrahazardous); and *Hartford Fire Ins. Co. v. Public Serv. Co.,* 676 P.2d 25 (Colo. App. 1983) (transmission of natural gas not ultrahazardous). *Cf. City of Northglenn v. Chevron U.S.A. Inc.,* 519 F. Supp. 515 (D. Colo. 1981), in which Judge Carrigan indicated his belief that the Colorado courts would extend the doctrine of ultrahazardousness to the storage of underground gasoline tanks. I note, however, that when Judge Carrigan decided *Northglenn,* he did not have the benefit of either of the Court of Appeals' or the Supreme Court's opinions in *Forrest. See generally* Restatement (2d) of Torts §§ 519 and 520 (recognizing the concept of ultrahazardousness but calling it "abnormally dangerous activities").

Plaintiff's argument that Whink Rust Stain Remover is ultrahazardous, and therefore that Whink is an absolute insurer of any and all damage caused by its sale of its product, would, if adopted, represent an entirely unwarranted and unprecedented expansion of the doctrine of ultrahazardousness.

Appendix A

V. THE UNCONTRADICTED FACTS ESTABLISH MISUSE AS A MATTER OF LAW

A. General

The defense of misuse in a products case was first expressly articulated by our Supreme Court in *Jackson v. Harsco Corp., supra.* The *Jackson* Court described the defense this way:

> Misuse by an injured party which cannot reasonably be anticipated by the manufacturer can be utilized as a defense in a products liability case by showing that the conduct of the user, and not the alleged defect in the product, actually caused the accident.

673 P.2d at 367. *See also Bradford v. Bendix-Westinghouse Automotive Air Brake Co.*, 33 Colo. App. 99, 517 P.2d 406 (1973). There are thus two elements which must be proved to establish the misuse defense: (1) the misuse must be unforeseeable from the manufacturer's point of view, and (2) the misuse must have caused the injuries.

One kind of misuse arises when an injured party uses a product for a purpose for which the product was not intended. But our appellate courts have come to recognize that it may also be misuse to use a product to accomplish its intended purpose, but to do so in an unforeseeably improper *manner. See, e.g., Uptain v. Huttington Lab, Inc.*, 723 P.2d 1322 (Colo. 1986) *Patterson v. Magna American Corp.*, 754 P.2d 1385 (Colo. App. 1988). When the user is notified of the proper manner of use, "the seller may reasonably assume that [such notice] will be read and heeded." *Uptain,* 723 P.2d at 1327, *citing* Comment J to the Restatement (2d) of Torts § 402A.

B. It Is Uncontroverted That Plaintiff Read And Understood The Warnings, And Unforeseeably Misused The Product By Failing To Heed The Warnings.

It is certainly true that the foreseeability of any misuse is a question of fact, generally inappropriate for resolution by summary judgment. *Uptain, supra.*

On the other hand, where, as here, a plaintiff admits to reading a warning, and to consciously choosing to disregard the warning, and when heeding that warning would have avoided all of a plaintiff's injuries, then I do not believe there is anything left for a jury to decide.

Plaintiff testified as follows regarding her reading and appreciation of the front label warnings:

Q: Did you read the bottle before you opened it?

A: I read the front part of it.

Plaintiff's Deposition, p. 25, lines 18-20.

Q: Why didn't you go get some gloves?

A: Because I didn't have any gloves.

Id. at 28, lines 23-24.

Q: Before you used the product, did you read the words "causes severe burns," before you used the product?

A: I read the front of that bottle.

Q: All of it?

A: Yes.

Q: Before you used the bottle?

A: Yes.

Id. p. 45, lines 2-9.

Q: You didn't have any questions about what [the label] meant?

A: No.

Id. p. at 47, lines 11-13.

Q: All right. We get down to the sentence that reads: "Use only with heavy duty household rubber gloves." If I understand what you told Mr. Cooper, the reason that you didn't use household rubber gloves was because you didn't have any there?

A: Right.

Q: Any you didn't want to spend the time to go back to the store to get some?

A: Right. And by using the rag, I felt it was the same way of not getting contact to my skin. I felt it was thick enough, that there was no way it could reach my skin.

Appendix A

Id. at 152, lines 21-25; 153, lines 1-5.

Q: Did you think about going back to the store to get rubber gloves?

A: I thought in my head: What harm could it do, I'm not using it straight on my hand.

Q: When you read that sentence, did you understand that it was important to protect yourself from this product contacting your skin?

A. Yes, I did.

Q: Did you think about going back to the grocery store to get rubber gloves so that that wouldn't happen?

A: No.

Id. at 153, lines 14-25.

Q: Even though you started out thinking that the heavy rag would be sufficient to keep the product away from your skin, at some point during the cleaning process, you realized that it wasn't because you felt wetness on your skin, is that right?

A: Yes.

Q: At that time did you consider going back to the grocery store to get some rubber gloves so you wouldn't have any additional contact on your skin from the product?

A: No, because I didn't feel nothing that would indicate that something was wrong.

Q: You did read the sentence that says: "Causes severe burns which may not be immediately painful or visible"?

A: When I was reading it as a paragraph, yes.

Id. at 154, lines 8-25.

It is clear to me from this deposition transcript not only that Plaintiff read and appreciated the warnings placed on the front of the bottle, but also that there was nothing on earth that Whink could have done to make these warnings sink in.[2] This is one of those extreme misuse cases, like *Schultz v. Linden-Alimak, Inc.*, 734 P.2d 146 (Colo. 1986), in which a manufacturer places warnings on a product, the warnings are sufficient to be understood and appreciated by the plaintiff, but the plaintiff simply and plainly chooses to ignore the warnings.

Uptain, which also involved injuries to a plaintiff who used a cleaning product without rubber gloves, is quite instructive. In affirming the trial court's conclusion that misuse was a question of fact for the jury, the Supreme Court made much of the fact that the warnings in that case did *not* contain explicit directions to wear rubber gloves. Moreover, it was the plaintiff in *Uptain* arguing that her misuse was foreseeable as a matter of law, rather than the defendant arguing it was unforeseeable. Finally, the plaintiff in *Uptain* used a swab to apply the product; she came in

---

2. I have reviewed not only the portion of Plaintiff's transcript which Defendants submitted with their briefs, but the entire transcript, which I directed Defendants to submit prior to the September 10, 1992 hearing.

contact with the product directly only when periodically wringing the swab out during *rinses.*

Here, the evidence is also undisputed, as it was in *Schultz,* that had Plaintiff not ignored the warnings — that is, had Plaintiff worn rubber gloves as directed — she would have avoided her injuries entirely. Report of Dr. Daniel A. Goldstein, dated May 28, 1991, attached as Exhibit F to Whink's Motion for Summary Judgment. Thus, it was Plaintiff's own volitional act of using the product contrary to the warnings which caused her injuries, not any product defect or failure to warn.

VI. CONCLUSION

For all of the reasons discussed above, Defendants' Motion for Summary Judgment is GRANTED as to all of Plaintiff's claims against Whink, and all of those claims are hereby DISMISSED WITH PREJUDICE. This dismissal will become a final judgment when Plaintiff's claims against the non-Whink Defendants are dismissed pursuant to the settlement.

Plaintiff and the non-Whink Defendants are directed to file a stipulated motion for dismissal and draft order reflecting their settlement within 30 days of the date of this Order.

Dated this 14th day of September, 1992.

BY THE COURT:

s/ Morris B. Hoffman
Morris B. Hoffman
District Court Judge

Appendix A

cc: A. Walsh
F. James Donnelly
J. Ronald Voss
L. Heintz
D. Smith

APPENDIX B — DECISION OF COLORADO COURT OF APPEALS DATED APRIL 7, 1994

April 7, 1994

COLORADO COURT OF APPEALS
No. 93 CA0055

Sandra Salazar,

Plaintiff-Appellant,

v.

Whink Products Company, an Iowa corporation,

Defendant-Appellee.

Appeal from the District Court of the City and County of Denver
Honorable Morris B. Hoffman, Judge
No. 90CV7830

Division I JUDGMENT AFFIRMED
Opinion by CHIEF JUDGE STERNBERG
Briggs and Tursi*, JJ., concur

Dyer Donnelly & Lilley, F. James Donnelly, Denver, Colorado, for Plaintiff-Appellant

Retherford, Mullen, Johnson & Bruce, J. Ronald Voss, Amelia L. Klemme, Colorado Springs, Colorado, for Defendant-Appellee

---

* Sitting by assignment of the Chief Justice under provisions of the Colo. Const. art. VI, Sec. 5(3), and §24-51-1105, C.R.S. (1988 Repl. Vol. 10B).

Appendix B

In this products liability action, plaintiff, Sandra Salazar, appeals the summary judgment entered in favor of defendant, Whink Products Co., which determined that Whink was not liable for plaintiff's injuries resulting from her use of its product, Whink Rust Stain Remover. We affirm.

Plaintiff asserts that genuine issues of material fact remain as to the adequacy of the warnings on the product and the foreseeability of her failure to heed those warnings. Whink contends that the trial court properly dismissed plaintiff's claims on the basis of her unforeseeable misuse of the product, but also argues that her claims are preempted by the Federal Hazardous Substances Act (FHSA), 15 U.S.C. §§ 1261-1277 (1988). It is undisputed that the label on the product at issue complies with the FHSA, and we conclude that the FHSA preempts plaintiff's duty to warn claims. Thus, we affirm the summary judgment, but on grounds different from those relied upon by the trial court.

Under the Supremacy Clause, U.S. Const., art. VI, cl. 2, state laws which "interfere with or are contrary to the laws of Congress, made in pursuance of the constitution," are invalid. *Gibbons v. Ogden,* 22 U.S. (9 Wheat.) 1, 6 L.Ed. 23 (1824). Whether a federal statute preempts a state law or claim turns on Congressional intent, and that intent may be explicit in the statute itself. *Cipollone v. Liggett Group, Inc.*, __ U.S. __, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992).

In its most recent pronouncement on federal preemption, the United States Supreme Court held that a broad statement in a federal law prohibiting state regulation also bars common law tort claims. *Cipollone v. Liggett Group, Inc., supra.*

Appendix B

The federal laws at issue in *Cipollone* were the Federal Cigarette Labeling and Advertising Act (1965 Cigarette Act) and the Public Health Cigarette Smoking Act of 1969 (1969 Cigarette Act), 15 U.S.C. §§1331-1340 (1988). The preemption provision in the 1965 Cigarette Act was narrow and stated: "No *statement* relating to smoking and health shall be required *in the advertising* of [properly labeled] cigarettes." *Cipollone, supra,* __ U.S. at __, 112 S. Ct. at 2618, 120 L.Ed.2d at 421 (emphasis in the original). Congress' emphasis on the words "statement" and "advertising" led the Court to conclude that the 1965 Cigarette Act preempted only state and federal regulations requiring additional warnings, but did not affect state law damages actions.

The 1969 Cigarette Act, however, used much broader language; it barred not merely "statements," but any "requirement[s] or prohibition[s] . . . imposed under stated law." *Cippolone, supra,* __ U.S. at __, 112 S.Ct. at 2619, 120 L.Ed.2d at 422. This language, the Court held, indicated legislative intent to ban state common law labeling and duty to warn claims along with direct state regulation of labels.

The court noted that: "[T]he phrase '[n]o requirement or prohibition' sweeps broadly and suggests no distinction between positive enactments and common law; to the contrary, those words easily encompass obligations that take the form of common law rules." *Cipollone, supra,* __ U.S. at __, 112 S.Ct. at 2620, 120 L.Ed.2d at 426.

In order to succeed in the wake of *Cipollone*, then, the plaintiff would have to show that FHSA's preemption language is less sweeping than the language of the 1969 Cigarette Act; however, we can discern no significant difference between the two.

Appendix B

The FHSA was enacted in 1960 to mandate labeling of certain "hazardous" consumer products intended for use in the household or by children. *Chemical Specialities Manufacturers Ass'n v. Allenby*, 958 F.2d 941 (9th Cir. 1992). The purpose of the Act was to "provide nationally uniform requirements for adequate cautionary labeling." House Committee On Interstate and Foreign Commerce, Federal Hazardous Substances Labeling Act, H.R. Rep. No. 1861, 86th Cong., 2d Sess. 2 (1960), *reprinted in* 1960 U.S. Code Cong. & Admin. News 2833. The scope of the Act's coverage as to these products is extremely broad. *Toy Manufacturers of America, Inc. v. Blumenthal*, 986 F.2d 615 (2d Cir. 1992). Thus, the central requirement of the Act is that manufacturers of hazardous products provide cautionary labels clearly indicating the hazards and providing consumers with directions for use. The parties do not dispute that the label on Whink Rust Stain Remover comports with the FHSA's labeling requirements.

As enacted, the FHSA did not contain a preemption section. However, when the Act was amended in 1966, the legislative history discussed the impracticality of having the states produce potentially fifty different labels for a particular hazardous substance. House Committee On Interstate and Foreign Commerce, Child Protection Act of 1966, H.R.Rep. No. 2166, 89th Cong., 2d Sess. 3 (1966), *reprinted in* 1966 U.S. Code Cong. & Admin. News 4095, 4097. The 1966 amendments added a limited preemption provision which provides as follows:

> It is hereby expressly declared that it is the intent of the Congress to supersede any and all laws of the States and political subdivisions thereof insofar as they may now or hereafter provide for the precautionary

> labeling of any substance or article intended or suitable for household use (except for those substances defined in sections 2(f) (2) and (3) of this Act) which differs from the requirements or exemptions of this Act or the regulations or interpretations promulgated pursuant thereto. Any law, regulation, or ordinance purporting to establish such a labeling *requirement* shall be null and void.

Child Protection Act of 1966, Pub. L. No. 89-756, 80 Stat. 1303 (1966) (current version at 15 U.S.C. § 1261 (1988)); *see also* § 13-21-403(1)(b) C.R.S. (1987 Repl. Vol. 6A) (emphasis added).

In our view, the language prohibiting a state from imposing "a requirement" for labeling that is not identical to the labeling requirements under the Act is as inclusive as the language of the 1969 Cigarette Act stating that "no requirement or prohibition" shall be imposed under state law. The prohibition of "a requirement" is the functional equivalent of "no requirement." *See Arkansas-Platte & Gulf v. Van Waters & Rogers*, 981 F.2d 1177 (10th Cir. 1993).

We find persuasive the reasoning of the court in *Moss v. Parks Corp.*, 985 F.2d 736 (4th Cir. 1993), which held that the FHSA preempted common law failure to warn claims when the plaintiff seeks additional or more clearly stated warnings than those required by the FHSA. In determining that the FHSA applied to common law tort actions as well as state labeling regulations, the court stated that: "[I]f federal law mandates a specific label and permits nothing additional or different, it can hardly be urged that a state tort duty based on a warning requirement that is more elaborate and different does not conflict.

The manufacturer in that case cannot comply with both." *Moss v. Parks Corp., supra*, at 739-740.

Moreover, the purposes underlying both legislative regulation of labeling and a state common law duty to warn are the same. Indeed, a state common law duty to warn is nothing more than a duty to label a product to provide information. In that sense, the common law duty is no less "a requirement" in the preemption scheme than a state statute imposing the same burden. The objective of the common law duty and a regulatory statute are the same. Both address a manufacturer's duty to convey information about a product through the medium of a label.

That a common law action can result in an award of damages to an injured party does not detract from the ultimate purpose of imposing a duty to warn the users of a product about its potential dangers or other properties. Therefore, we find in only logical to hold that the common law duty to warn is subjected to the same federal preemptive constraints as a state statute.

Accordingly, to the extent that plaintiff seeks additional, different, or more clearly stated warnings, her claim is expressly preempted by the FHSA.

Because of our disposition of this issue, it is unnecessary to address the remaining issues.

Judgment affirmed.

JUDGE BRIGGS and JUDGE TURSI concur.

FILED
FEB 24 1995
OFFICE OF THE CLERK

(3)

No. 94-1228

In The

Supreme Court of the United States

October Term, 1994

SANDRA SALAZAR,

Plaintiff, Petitioner,

v.

WHINK PRODUCTS CO., AN IOWA CORPORATION,

Defendant, Respondent.

On Petition For Writ Of Certiorari To The Colorado Supreme Court

REPLY TO BRIEF IN OPPOSITION

DYER DONNELLY & LILLEY
F. JAMES DONNELLY #12243
825 Logan Street
Denver, CO 80203-3114
(303) 861-3003

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

Whether the limited preemption provision contained in the Federal Hazardous Substance Act, 15 U.S.C. §1261 *et seq.* bars petitioner's state common law tort claim.

TABLE OF CONTENTS

Page

Question Presented for Review i

Table of Contents ii

Table of Citations iii

Reasons for Granting the Writ 1

I. FHSA Does Not Preempt Sandra Salazar's Claim... 1

II. Even if *Cipollone* Completely Bars Salazar's Claim, a Mandate is Warranted 8

Conclusion 10

TABLE OF CITATIONS

Page

CASES CITED

Chemical Specialties Mfrs. Ass'n v. Allenby, 958 F.2d 941 (9th Cir.), *cert. denied*, 113 S.Ct. 80 (1992) 8

Chemical Specialties Mfrs. Ass'n v. Clark, 482 F.2d 325 (5th Cir. 1973) 6

Cipollone v. Liggett Group, Inc., ___ U.S. ___, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992) 1, 4, 5, 9

Ferebee v. Chevron Chemical Co., 736 F.2d 1529 (D.C. Cir.), *cert. denied*, 469 U.S. 1062 (1984) 8

Matz v. Mile Hi Concrete, Inc., 819 P.2d 530 (Colo.App. 1991) 9

McCulloch v. State, 4 Wheat 316, 17 U.S. 316, 4 L.Ed. 579 (1819) 8

Moss v. Parks Corp., 985 F.2d 736 (4th Cir. 1993), *cert. denied*, ___ U.S. ___, 113 S.Ct. 2999, 125 L.Ed.2d 693 (1993) 1

Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) 1

Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 104 S.Ct. 615, 78 L.Ed.2d 2443 (1984) 1

Sorenson v. Sec'y of Treasury, 475 U.S. 851 (1986) 5

Sullivan v. Stroop, 496 U.S. 478 (1990) 5

United States Dep't of Treasury v. Fabe, 113 S.Ct. 2202 (1993) 5

TABLE OF CITATIONS – continued

Page

Wisconsin Public Intervenor v. Mortier, 501 U.S. 597, 111 S.Ct. 2476, 115 L.Ed.2d 532 (1991) 1, 4

STATUTES CITED

15 U.S.C. §1261 ..... 2, 4

15 U.S.C. §1262 4

C.R.S. §13-21-403 8

OTHER AUTHORITIES CITED

16 C.F.R. §1500 *et seq.* 4

Lawrence H. Tribe, American Constitutional Law §6-25 at 479 8

Sutherland Statutory Construction §47.16, p. 161 (Sands 4th ed. 1984) 5

APPENDIX

Page

Appendix A – 15 U.S.C. §1261 (Historical Note) . . App. 1

Appendix B – Court Order dated August 4, 1992 . . App. 4

REASONS FOR GRANTING THE WRIT

I. FHSA DOES NOT PREEMPT SANDRA SALAZAR'S CLAIM

Whink argues that the Colorado Court of Appeals' decision in this matter denying Sandra Salazar's claim was merely a run-of-the-mill application of already well established law. This is not the case. While the Fourth Circuit in *Moss v. Parks Corp.*, 985 F.2d 736 (4th Cir. 1993) *cert. denied* ___ U.S. ___, 113 S.Ct. 2999, 125 L.Ed.2d 693 (1993) is arguably inapposite to Salazar's position, *all* of the remaining authorities relied on by Whink involve statutes other than FHSA. These non-FHSA decisions are of questionable precedential value in light of *Cipollone's* instructions that when Congress considers preemption through a specific preemption clause, the issue becomes solely a question of statutory interpretation (*Cipollone, supra*, 112 S.Ct. 2618).

The Colorado Court of Appeals in its decision in this matter considered only a very abbreviated portion of FHSA's preemption provision (decision found original brief Appendix at page 8). A careful consideration of the entire FHSA preemption provision leads to a different conclusion, particularly in light of three bedrock principles applicable to any preemption analysis.

First, because of the importance of preserving our delicate state-federal balance, there is a strong presumption against preemption that may only be overcome by "clear and manifest" Congressional intent to oust state law. See *Wisconsin Public Intervenor v. Mortier*, 111 S.Ct. 2476, 2482, 2485 (1991).

Second, this presumption is even stronger where, as in this case, preemption would displace the historic power of the state to protect the health and safety of its citizenry. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Third, where a finding of preemption of common law claims would leave injured consumers without *any* state *or* federal remedy, as is the case here, a court may ascribe preemptive intent to Congress only in the most compelling circumstances. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984).

With the foregoing principles in mind, we now turn to the text of the FHSA preemption provision and analyze it in its entirety.

Preemption of state and local labeling requirements is addressed in Section 18(b) of the FHSA, 90 Stat. 510 (15 U.S.C. §1261 note). Section 18(b) provides in relevant part:

> (b)(1)(A) Except as provided in paragraphs (2) and (3), if a hazardous substance or its packaging is subject to a cautionary labeling requirement under section 2(p) or 3(b) [of FHSA] designed to protect against a risk of illness or injury associated with the substance, no state or political subdivision of a state may establish or continue in effect a cautionary labeling requirement applicable to such substance or packaging and designed to protect against the same risk of illness or injury unless such cautionary labeling requirement is identical to the labeling requirement under section 2(p) or 3(b) [of FHSA]. . . .
>
> (2) The Federal Government and the government of any state or political subdivision of a state may establish and continue in effect a requirement applicable to a hazardous substance for its own use (or to the packaging of such a substance) which requirement is designed to protect against a risk of illness or injury associated with such substance and which is not identical to a requirement described in paragraph (1) applicable to such substance (or packaging) and designed to protect against the same risk of illness or injury if the federal, state, or political subdivision requirement provides a higher degree of protection from such risk of illness or injury than the requirement described in paragraph (1).
>
> (3)(A) Upon application of a state or political subdivision of a state, the Commission may, by regulation promulgated in accordance with subparagraph (B), exempt from paragraph (1), under such conditions as may be prescribed in such regulation,

any requirement of such state or political subdivision designed to protect against a risk of illness or injury associated with a hazardous substance if –

(i) compliance with the requirement would not cause the hazardous substance (or its packaging) to be in violation of the applicable requirement described in paragraph (1), and

(ii) the state or political subdivision requirement

(I) provides a significantly higher degree of protection from such risk of illness or injury than the requirement described in paragraph (1), and

(II) does not unduly burden interstate commerce.

In determining the burden, if any, of a state or political subdivision requirement of interstate commerce, the Commission shall consider and make appropriate (as determined by the Commission in its discretion) findings on the technological and economic feasibility of complying with such requirement, the cost of complying with such requirement, the geographic distribution of the substance to which the requirement would apply, the probability of other states or political subdivisions applying for an exemption under this paragraph for a similar requirement, and the need for a national, uniform requirement under this Act for such substance (or its packaging). . . .

(4) Paragraph (1)(B) [concerning banned substances under FHSA] does not prohibit a state or a political subdivision of a state from establishing or continuing in effect a requirement which is designed to protect against a risk of illness or injury associated with fireworks devices or components thereof and which provides a higher degree of protection from such risk of illness or injury than a requirement in effect under a regulation of the Commission described in such paragraph.

Section 18(b)(1)(A) does *not* use or refer to the term "state law" in defining the bounds of its preemption. The language "state law" was critical to the analysis in *Cipollone* because "state law" may, of course, encompass common law. Rather, Section 18(b)(1)(A) provides that "no state or political subdivision of a state may establish or continue in effect a cautionary labeling requirement." It strains ordinary English usage well past the breaking point to say that a jury award to a tort plaintiff constitutes a "state or political subdivision of a state establish[ing] or continu[ing] in effect a . . . requirement." The illogic of Whink's argument is especially evident when measured against the strong presumption against preemption that animates the Supreme Court's Supremacy Clause jurisprudence. *See Mortier*, 111 S.Ct. at 2482, 2485. There is surely no "clear and manifest" language in Section 18(b) demonstrating Congress' intent to deprive individuals, such as Sandra Salazar, compensation for her losses. *Id.* at 2482.

Second, although the Colorado Court of Appeals relied heavily on the fact that both the statute in *Cipollone* and Section 18(b) FHSA use the term "requirement," (original brief) the question whether that term covers common law damage actions depends on its context in the operative statute. Section 18(b)(1)(A) uses the word "requirement" several times; the first time is to explain which federal requirements may have preemptive effect:

> if a hazardous substance or its packaging is subject to a cautionary labeling requirement under section 2(p) or 3(b) [of the FHSA, 15 U.S.C. §§1261(p), 1262(b)] designed to protect against a risk of illness or injury associated with the substance. . . .

The use of the term "requirement" is a clear, unambiguous reference to the requirements for labels placed on containers of hazardous substances themselves. These label requirements are demanded by the federal government, either by statute or regulation. *See* 15 U.S.C. §§1261(p), 1262(b); 16 C.F.R. §§1500.14-15, 1500.82-83, 1500.121-125, 1500.128-134. It is evident, then, that this first use of the term "requirement" in Section 18(b) is *not* a reference to common law remedies.

And, given the strong presumption against preemption, the fact that Congress' primary reference to "requirement" in subsection (b)(1)(A) is only to statutes and regulations, counsels very heavily against a finding of preemption here.

Later in subsection (b)(1)(A), the term "requirement" is used again to refer to the actions of states and their political subdivisions that may be preempted by the FHSA. The term is stated identically to its first use, without any embellishment or reference to damage actions or the common law, and there is no reason to believe that Congress meant it to be interpreted differently the second time. Thus, acceptance of Whink's view of subsection (b)(1)(A) would subvert "[t]he normal rule of statutory construction [that] assumes that identical words used in different parts of the same act are intended to have the same meaning." *Sorenson v. Sec'y of Treasury*, 475 U.S. 851, 860 (1986) (internal quotations and case citations omitted). *See also, e.g., Sullivan v. Stroop*, 496 U.S. 478, 484 (1990); *United States Dep't of Treasury v. Fabe*, 113 S.Ct. 2202, 2215 (1993) (Scalia, J., dissenting) (referring to principle as "basic rule of statutory construction"); *Sutherland Statutory Construction* §47.16, p. 161 (Sands 4th ed. 1984) (multiple uses of same word ought to be accorded same meaning). In short, there can be no doubt that the "requirements" of state law are the same type of "requirements" of federal law referred to at the beginning of Section 18(b)(1)(A), *i.e.* statutes and regulations, not common law damage remedies.[1]

Third, the reference in subsection (b)(1)(A) to the requirements of a "state or *political subdivision of a state*" provides additional evidence that Congress had no intention to preempt state common law actions. Political subdivisions of states, such as counties and towns, often enact health and

---

[1] This factor further distinguishes Section 18(b) from the provision in *Cipollone*, where not only did the preemption language refer expansively to *all* "state law," but it mentioned the term "requirement" only once, referring *only* to state law, and making no mention of federal "requirements." *See Cipollone*, 112 S.Ct. at 2617 (quoting relevant preemption language, Section 5(b) of Public Health Cigarette Smoking Act of 1969).

safety laws, some of which regulate hazardous substances that come under the jurisdiction of the FHSA. *See Chemical Specialties Mfrs. Ass'n v. Clark*, 482 F.2d 325 (5th Cir. 1973); *cf. Mortier*, 111 S.Ct. at 2480-81 (local ordinance regulating pesticides analyzed under federal pesticide preemption provision). Thus, it made sense for Congress to include political subdivisions in the coverage of Section 18(b), lest there be some ambiguity as to the breadth of the term "state." However, political subdivisions do not generally establish courts of general jurisdiction that conduct jury trials in product liability cases; rather, as in Colorado, those courts are creatures of the state itself. Nor do political subdivisions maintain common law duties under which individuals can seek redress. Thus, Section 18(b)'s preemption of the actions of political subdivisions can only sensibly apply to the positive enactments of local governments. And, therefore, by using the integrated term "state or political subdivision of a state," whose legislative and regulatory bodies "establish or continue in effect" labeling requirements, Congress could not have meant Section 18(b) to preempt jury awards in tort cases. Put another way, this Court should not ascribe to Congress a broader preemptive intent concerning the actions of the states themselves than to their political subdivisions, without at least some indication that Congress had such an intent.

Fourth, Whink wholly ignores subsections (b)(2), (b)(3), and (b)(4) of Section 18, each of which provide further confirmation that Congress did not intend to preempt state common law actions. Subsection (b)(2) allows the federal and state governments to establish "requirements" for [their] own use" if those requirements "provide a higher degree of proteciton" than do the relevant FHSA labeling requirements. Once again, it is absolutely clear that the reference to "requirements" here is to the positive enactments of legislative and regulatory bodies, since federal and state governments obviously do not "establish and continue in effect" labeling requirements "for [their] own use" that consist of damage awards. Again, it would be inconsistent with the principle of statutory construction that multiple uses of the same word in the same statute ought to be accorded the same

meaning, to expand the term "requirement" to cover common law actions, while Congress clearly intended a more restrictive meaning of that term elsewhere in the statute.

Subsection (b)(3) further undermines the contention that Section 18(b) is applicable to common law claims. Subsection (b)(3) allows states or their political subdivisions to apply to the federal Consumer Product Safety Commission ("CPSC") for exemptions from preemption, so that they can maintain requirements that are otherwise preempted. Subsection (b)(3)'s language is parallel to that of subsection (b)(1)(A), *i.e.*, it permits exemption of *any* labeling requirement that may be preempted, but only upon applications of "states or political subdivision[s]." The obvious purpose of subsection (b)(3) is to allow state and local governments to seek exemptions for their laws and regulations, and it could not logically include tort actions, which depend on the particular facts of each case. Thus, to interpret subsection (b)(1)(A), upon which defendant relies, to include the preemption of common law claims, when subsection (b)(3) plainly does not, would suggest that Congress intended to inject an awkward and illogical asymmetry into Section 18(b).

Finally, subsection (b)(4) allows the states and their political subdivisions to establish or continue in effect requirements designed to protect their citizens from fireworks as long as those requirements are more protective than the standards established under the FHSA. A common sense reading of Section 18(b) indicates that these "requirements" are not common law actions, but the enactments of state and local governments. Once again, there is no reason to believe that Congress singled out state damage awards as "requirements" that could be preempted under subsection (b)(1)(A), when it did not do so anywhere else in the statute. Rather, as we have shown, Congress limited the preemptive reach of the FHSA to state and local enactments.

As the foregoing discussion indicates, the overall structure of Section 18(b) of FHSA makes it clear that Congress wanted to preempt only certain state and local enactments that require manufacturers to label their products in a particular manner. State tort law can, on occasion, send a signal to a

manufacturer that its label does not convey all the information necessary to protect a person from injury. However, its principal purpose is to compensate victims, and a verdict for a plaintiff would *not* require a manufacturer to label its product in any particular manner as do state laws and regulations. *See Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529, 1541 (D.C. Cir.), *cert. denied*, 469 U.S. 1062 (1984). Thus, a tort award in this case would be consistent with the purpose of FHSA – to protect the public from hazardous substances. In the event Whink decided to relabel its product, such an action would not violate FHSA which requires that certain statements be made, but in no way prevents warnings as suggested by Salazar. *Accord, Chemical Specialties Mfrs. Ass'n v. Allenby*, 958 F.2d 941, 950 (9th Cir.), *cert. denied*, 113 S.Ct. 80 (1992).

II. EVEN IF *CIPOLLONE* COMPLETELY BARS SALAZAR'S CLAIM, A MANDATE IS WARRANTED.

Whink repeatedly states in its brief that its compliance with FHSA was undisputed by Salazar. While the Colorado Court of Appeals made such a finding, the finding was in error. The record in this matter is devoid of one single reference wherein Salazar either expressly or impliedly admitted that Whink complied with FHSA. Salazar was simply silent on this issue because while her case was being litigated, compliance with FHSA was not a critical issue.

Whink argues that since *McCulloch v. State*, 4 Wheat 316, 17 U.S. 316, 4 L.Ed. 579 (1819), the doctrine of preemption has been in existence and Salazar therefore should have conducted discovery concerning Whink's compliance with FHSA (page 8 in Whink's brief). Such an argument ignores the evolving nature of the doctrine (*see* Lawrence H. Tribe, American Constitutional Law §6-25 at 479), or, for that matter, the evolving nature of the law itself. The argument also ignores a Colorado statute directly on point, C.R.S. 13-21-403, which makes compliance with federal regulations only a "rebuttable presumption" that the product was "not

defective" (Appendix A, original brief). At the time of the *Cipollone* decision, the statute had been applied as recently as March 1991. *Matz v. Mile Hi Concrete, Inc.*, 819 P.2d 530 (Colo.App. 1991) (later affirmed in part and reversed in part on unrelated grounds, 842 P.2d 198 (Colo. 1992)).

On January 7, 1992, Whink moved for summary judgment based on both preemption grounds and misuse of the product. The motions were fully briefed, of course, without reference to *Cipollone*, which had not been decided. *Cipollone* was decided while the motions were pending. On August 4, 1992, before *Cipollone* had even made the reporters, the court entered an order setting Whink's motion for summary judgment (R. p. 435, Appendix B). The court's order is brief, and bears quoting directly:

> The parties are directed to contact my division clerk, within 10 days of the date of this order, to set this matter for a one hour oral argument on Defendant's Motion for Summary Judgment. *That oral argument will be limited to the issue of the misuse defense.* (emphasis added)

As of August 4, 1992, prior to publication of the *Cipollone* decision, the court had reviewed Whink's arguments regarding preemption and, by implication, held them unimportant. It would have been folly for Salazar's counsel to then conduct discovery upon an issue that the trial court had already eliminated from the case.

Contrary to the assertions of Whink (p. 9 of their brief), Salazar did *not* lose Whink's Motion for Summary Judgment based upon preemption issues. Rather, the court decided the issue wrongfully on the misuse defense (Appendix 1A-14A of Respondent's Brief in Opposition). It was only on appeal, well after discovery had been terminated, that Sandra Salazar's claim was barred by preemption.

If the *Cipollone* case stands for the proposition that state common law claims for failure to warn are barred by FHSA, such a proposition is a significant change to the law of Colorado. This is a change which came to Sandra Salazar long after her complaint was filed, and after a point in the action in which her counsel could take steps necessary to evaluate and

act on the change. Sandra Salazar should, at least, be granted an opportunity to present evidence in her possession that Whink's label did not comply with FHSA.

CONCLUSION

For each of the reasons stated above, plaintiff Sandra Salazar hereby petitions this Court for a writ of certiorari reviewing the decisions of the Colorado Court of Appeals and the denial of certiorari by the Colorado Supreme Court.

Respectfully submitted this 23rd day of February, 1995.

DYER DONNELLY & LILLEY
F. JAMES DONNELLY #12243
825 Logan Street
Denver, CO 80203-3114
(303) 861-3003

APPENDIX A

15 U.S.C. §1261, HISTORICAL NOTE

(b)(1)(A) Except as provided in paragraphs (2) and (3), if a hazardous substance or its packaging is subject to a cautionary labeling requirement under section 2(p) or 3(b) [of FHSA] designed to protect against a risk of illness or injury associated with the substance, no state or political subdivision of a state may establish or continue in effect a cautionary labeling requirement applicable to such substance or packaging and designed to protect against the same risk of illness or injury unless such cautionary labeling requirement is identical to the labeling requirement under section 2(p) or 3(b) [of FHSA]. . . .

(2) The Federal Government and the government of any state or political subdivision of a state may establish and continue in effect a requirement applicable to a hazardous substance for its own use (or to the packaging of such a substance) which requirement is designed to protect against a risk of illness or injury associated with such substance and which is not identical to a requirement described in paragraph (1) applicable to such substance (or packaging) and designed to protect against the same risk of illness or injury if the federal, state, or political subdivision requirement provides a higher degree of protection from such risk of illness or injury than the requirement described in paragraph (1).

(3)(A) Upon application of a state or political subdivision of a state, the Commission may, by regulation promulgated in accordance with

subparagraph (B), exempt from paragraph (1), under such conditions as may be prescribed in such regulation, any requirement of such state or political subdivision designed to protect against a risk of illness or injury associated with a hazardous substance if –

> (i) compliance with the requirement would not cause the hazardous substance (or its packaging) to be in violation of the applicable requirement described in paragraph (1), and
>
> (ii) the state or political subdivision requirement
>
> (I) provides a significantly higher degree of protection from such risk of illness or injury than the requirement described in paragraph (1), and
>
> (II) does not unduly burden interstate commerce.

In determining the burden, if any, of a state or political subdivision requirement of interstate commerce, the Commission shall consider and make appropriate (as determined by the Commission in its discretion) findings on the technological and economic feasibility of complying with such requirement, the cost of complying with such requirement, the geographic distribution of the substance to which the requirement would apply, the probability of other states or political subdivisions applying for an exemption under this paragraph for a similar requirement, and the need for a national, uniform requirement under this Act for such substance (or its packaging). . . .

(4) Paragraph (1)(B) [concerning banned substances under FHSA] does not prohibit a state or a political subdivision of a state from establishing or continuing in effect a requirement which is designed to protect against a risk of illness or injury associated with fireworks devices or components thereof and which provides a higher degree of protection from such risk of illness or injury than a requirement in effect under a regulation of the Commission described in such paragraph.

(B) Except as provided in paragraphs (2), (3), and (4), if under regulations of the Commission promulgated under or for the enforcement of section 2(g) [subsec. (g) of this section] a requirement is established to protect against a risk of illness or injury associated with a hazardous substance, no State or political subdivision or a state may establish or continue in effect a requirement applicable to such substance and designed to protect against the same risk of illness or injury unless such requirement is identical to the requirement established under such regulations.

15 U.S.C. §1261, Historical Note – Effect upon Federal and State Law – Pub.L. 86-613, §18, formerly 17, July 12, 1960, 74 Stat. 380, as amended Pub.L. 89-756, §4(a), Nov. 3, 1966, 80 Stat. 1305; renumbered and amended Pub.L. 91-113, §4(a), (b)(1), Nov. 6, 1969, 83 Stat. 189, 190; Pub.L. 94-284, §17(a), May 11, 1976, 90 Stat. 510.

APPENDIX B

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO

Case No. 90-CV-7830 Courtroom 21

ORDER

SANDRA SALAZAR,

Plaintiff,

v.

WHINK PRODUCTS CO., an Iowa corporation and MONTE VISTA ARAPAHOE, INC., dba MONTE VISTA SUPER FOODS, a Colorado Corporation, ROBERT W. SPLETTSTOESSER, M.D., and MONTE VISTA PROFESSIONAL ASSOCIATES,

Defendants.

The parties are directed to contact my division clerk, within 10 days of the date of this Order, to set this matter for a one hour oral argument on Defendants' Motion for Summary Judgment. That oral argument will be limited to the issue of the misuse defense.

Defendants are directed to tender a complete copy of the transcript of Plaintiff's Deposition five days before the argument.

Dated this 4th day of August, 1992.

BY THE COURT:

/s/ Morris B. Hoffman
Morris B. Hoffman
District Court Judge

cc: A. Walsh
J. Ronald Voss
L. Heintz
F. James Donnelly
P. Pearson